

435
230

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 884. ~~230~~ 106.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 22, 1894.

(16,154.)

230.
15
1150
230
8450

(16,154.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 864.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

Original. Print.

Caption.....	1	1
Petition.....	1	1
Traverse.....	11	6
Findings of fact.....	12	7
Conclusion of law.....	24	24
Opinion.....	25	24
Judgment.....	43	45
Application for and allowance of appeal.....	44	45
Clerk's certificate.....	45	45



1

In the Court of Claims.

THE NEW YORK INDIANS, Being Those Indians
 who were Parties to the Treaty of Buffalo Creek,
 New York, on the 15th Day of January, A. D. 1838, } No. 17861.
vs.
 THE UNITED STATES. }

I.—Petition. Filed February 10, 1893.

The petition of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, of the 15th day of January, A. D. 1838, namely, the New York Indians in the States of New York and Wisconsin, including the Seneca nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge and Munsee tribes of Indians, respectfully represents:

1. The claimants were parties to the treaty between the New York Indians and the United States, concluded on the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, being the same Indians mentioned and described in the certain act of Congress, public No. 34, 52d Congress, second session, approved January 28th A. D. 1893, hereinafter more specifically mentioned and referred to.

2. On the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, there was concluded between the claimants and the United States a treaty known as the treaty of Buffalo Creek, wherein and whereby it was provided, in consideration of the premises therein recited, and of the covenants contained in the treaty itself to be performed by the United States, that the claimants ceded and relinquished to the United States all their right, title and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States in by the said treaty, agreed and guaranteed as follows:

First. To set aside as a permanent home for all of the claimants, a certain tract of country west of the Mississippi river, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (18,240,000) acres of land, the same to be divided among the different tribes, nations or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in the certain schedule annexed to the said treaty, and designated as Schedule A, on condition that such of the claimants as should not accept, and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest to the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new

homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes and nations of the claimants, hereinafter mentioned, on their removal to the following sums respectively, namely: To the St. Regis Indians, five thousand dollars (\$5,000); to the Seneca nation, the interest annually of one hundred thousand dollars (\$100,000), (being one-tenth of the money due said nation for lands sold by them in New York); and which sum they authorized to be paid to the United States; to the Cayugas, twenty-five hundred dollars (\$2,500) in cash, and the annual income of twenty-five hundred dollars (\$2,500); to the Onondagas, two thousand dollars (\$2,000) in cash and the annual income of twenty-five hundred dollars (\$2,500); to the Oneidas, one thousand dollars (\$1,000) in cash, and to the Tuscaroras, three thousand dollars.

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars (\$400,000), to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired but were exempted from obligation so to do.

The treaty of Buffalo Creek having been duly assented to by all the parties thereto, was afterwards on, to wit, the 4th day of April, A. D. 1840, duly proclaimed; and certain disputes thereunder having arisen, it was afterwards modified in some particulars not having reference to the matter of this claim, and as so modified was again proclaimed on, to wit, the 26th day of August, 1842.

3. At the time of the making of the treaty of Buffalo Creek aforesaid, and for many years prior thereto, the claimants owned and occupied valuable tracts of land in the State of New York, and had improved and cultivated the same and resided thereon, and from the products thereof chiefly sustained themselves.

4. The President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, and no provision of any kind was ever made for the actual removal of more than about two hundred and sixty individuals of the claimant tribes, as contemplated by the said treaty; and of this number only thirty-two ever received patents or certificates of allotment of any of the lands mentioned in the first article of the said treaty and the land allotted

to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

5. After the conclusion of the said treaty of Buffalo Creek the United States surveyed and made part of the public domain the lands at Green Bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

6. The lands west of the Mississippi river, secured to the claimants by the said treaty of Buffalo Creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation and so remained until in, or about the year A. D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the State of Kansas. The said lands at the time the same were so appropriated by the United States, were of great value, to wit, of the value of one dollar and twenty-five cents (\$1.25) per acre and upwards.

7. The action of the United States in appropriating the said lands as aforesaid, was in pursuance of the proclamation of the President of date December 3d and 17th, 1860, and grew out of an order of the Secretary of the Interior of the 21st day of March, A. D. 1859; and between the said last-mentioned date and the proclamation of the said lands aforesaid, the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof; and the claimants have steadily since asserted said claim in the premises.

8. Of the sum of \$400,000 agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes aforesaid only the sum of \$20,477.50 was ever so appropriated, except as hereinafter stated; and of this sum only \$9,464.08 was actually expended.

9. By treaty with the Tonawanda band of the Seneca nation claimants herein, which said band numbered 650 individuals, the United States on November 5th, 1857, in consideration of the release by the said band of its claims upon the United States to the lands west of the Mississippi river, all right and claim to be removed thither and for support and assistance after removal and all other claims against the United States under the treaties of 1838 and 1842 (reserving certain rights not material to be considered in the premises), agreed to pay and invest, and did pay and invest for said band the sum of \$256,000; which payment and investment amounted in substance to compensating the members of the said band at the rate of one dollar per acre for their claims to the lands in Kansas under said treaty, and also their proportionate share of the sum of \$400,000 aforesaid, to wit, 208,000 acres of land and \$48,000 of the said sum of \$400,000.

10. The certain sum of \$100,000, the income of which as aforesaid

the United States agreed to pay annually to the Seneca nation, has heretofore been paid and invested or an adjustment has been had in relation thereto between the said Seneca nation and the United States to the satisfaction of the said nation, and there now remains to the said nation no claim upon the United States in respect thereof.

7 11. On June 21st, A. D. 1884, in accordance with the provisions of the act of March 3, A. D. 1883, entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," the claims of the claimants in the premises, together with the vouchers, papers, proofs and documents appertaining thereto, were referred to this court for investigation and determination of the facts involved. The said claims were thereupon duly presented to this court, the same being known upon the records thereof as congressional case No. 151, and upon consideration thereof this court duly found and returned to the Senate, conformably to law in that behalf, its findings of fact as aforesaid, the same being set forth in Senate Miscellaneous Document No. 46, Fifty-second Congress, first session, and being the findings mentioned and described in the said act, approved January 28th, 1893, aforesaid.

12. Thereafter, by act approved January 28th, 1893, being public No. 34 of the acts of the Congress of the United States of the Fifty-second Congress, second session, the claims of the claimants in the premises were again referred to this court for final adjudication, which said act is as follows:

"An act to authorize the Court of Claims to hear and determine the claims of certain New York Indians against the United States.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties
8 to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States. In the hearing and adjudication of said case said court may proceed upon the finding of facts already made, upon reference of said claim to said court, filed on the 11th day of January, 1892, and transmitted to Congress by John Randolph, assistant clerk of said court, on the 16th day of January, 1892. Or said court may, if in its opinion justice so requires, take other testimony as to the facts. But in any judgment it may render against the United States, in favor of said claimants, interest shall not be allowed. The statute of limitations shall not be pleaded as a bar to recovery in said case. The Attorney General is hereby directed to appear in behalf of the United States in said case. And from any judgment rendered by the court, either party may appeal to the Supreme Court of the United States. Said cause shall be advanced on the docket and tried without delay in any court which shall be-

come invested with jurisdiction thereof by the provisions of this act.

Approved, January 28, 1893."

And the claimants file this their petition in conformity therewith.

13. The parties interested in this claim are the Seneca nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge and Munsee tribes of New York Indians, as enumerated in the Schedule A aforesaid, and their descendants, except the Tonawanda band of Senecas, who were, as aforesaid, provided for by the treaty of November 5th, 1857, as aforesaid; and no assignment of said claim or any part thereof or interest therein has been made. And the claimants have never in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States, and they are justly entitled to the amount claimed in this petition after allowing all just credits and offsets.

14. The premises considered, the claimants claim and demand of the United States as follows:

For 1,605,760 acres of land at \$1.25 per acre	\$2,007,200 00
Balance of the above-mentioned sum of \$400,000, after deducting the \$18,000 paid to the Tonawanda band as aforesaid	352,000 00

The various sums so as aforesaid agreed to be paid in cash to separate tribes of the claimants as follows:

To the Cayugas	\$2,500 00
To the Onondagas	2,000 00
To the St. Regis tribe	5,000 00
To the Oneidas	6,000 00
To the Tuscaroras	3,000 00
	<hr/>
	\$18,500 00

To the income so as aforesaid agreed to be paid to certain of the said tribes as follows:

To the Cayugas the annual income of \$2,500, from the date of the proclamation of the said treaty to the filing of this petition, to wit, fifty-three years. .	\$7,950 00
To the Onondagas, the annual income of \$2,500 from the date of the proclamation of the said treaty to the filing of this petition, to wit, fifty-three years. .	7,950 00

10 The claimants, therefore, demand judgment in their favor against the United States for the sum of \$2,393,600, and that the same be distributed and divided by the judgment and decree of this court to and among the claimants as follows:

The Seneca nation, the Oneida, Onondaga, Tuscarora, Cayuga and St. Regis tribes of New York, and the Oneida, Stockbridge,

Brothertown and Munsee tribes of Wisconsin respectively, in the ratio and on the basis of the number of individuals in each of said nation-or tribes as the same existed at the time of the making said treaty of Buffalo Creek, as shown by and mentioned in said Schedule A, to the said treaty aforesaid, which is as follows (excepting therefrom the 650 Senecas of the Tonawanda band aforesaid), that is to say :

Senecas (2,309 less 650)	1,659
Onondagas, with the Senecas.....	194
Cayugas.....	150
Onondagas at Onondaga.....	300
Tuscaroras.....	273
St. Regis.....	350
Oneidas at Green Bay.....	600
Oneidas in New York.....	620
Stockbridges in New York.....	217
Munsees.....	132
Brothertowns.....	360

And the claimants pray for such other and further relief and judgment in the premises as to the court may seem proper.

GUION MILLER,

Att'y of Record.

HENRY E. DAVIS,

GEORGE BARKER,

JAMES B. JENKINS,

JONAS H. MCGOWAN,

Of Counsel.

DISTRICT OF COLUMBIA, ss :

Before me, assistant clerk of the Court of Claims of the United States, personally appeared Guion Miller, who being first duly affirmed, deposes and says that he is one of the attorneys of the claimants mentioned in the foregoing petition, as in and by the power of attorney in that behalf on file in the congressional case No. 151, in the Court of Claims of the United States, appears : that he has read the said petition and knows the contents thereof and that the statements therein made are true to the best of his knowledge and belief.

GUION MILLER.

Subscribed and affirmed to before me this 10th day of February, A. D. 1893.

(Signed)

JOHN RANDOLPH. [SEAL.]

Ass't Clerk, Court of Claims.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies

each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,

Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law.* Filed January 6, 1896.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that State.

The court decide that the Indians described in the jurisdictional act sending this case to this court as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.

II.

Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their Western brethren with the privilege of removing to and occupying the same, without changing their existing relations and treaties with the Government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendants aided some ten Indians representing plaintiffs in exploring certain parts of Wisconsin with a view to making arrangements with the Indians residing there for a portion of their country, to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas, and Oneida nations of New York Indians.

13 August 18, 1821, the Menomonie and Winnebago nations, in consideration of \$2,000, chiefly in goods, ceded, released, and quitclaimed all their right, title, and claim in certain lands near Green Bay, Wis., amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge, and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge, and Munsee nations, of the one part, and the Menomonies and Winnebagoes of the other, is approved, with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge, and Munsee nations are to be held by them in the same manner as they were previously held by the Menomonies and Winnebagoes.

JAMES MONROE.

February 19, 1822.

The \$2,000 above mentioned was thus paid: In goods, \$900 from the Stockbridges, \$400 from the Oneidas, \$200 from the Tuscaroras; in cash, \$500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

III.

Permission to secure an extension of the cession in the preceding finding recited was given by the Secretary of War, and thereafter, on September 23, 1822, the Menomonies, in consideration of \$3,000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined (adjoining the above), to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, the releasees promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon bay, Green bay, Fox river; that part of the former purchase made by said tribes or nations of Indians of the Menomonie and Winnebago Indians on the 8th August, 1821, which lies south of Fox river and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon bay, and no farther, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the Government has assented, are to be held by

them in the same manner as they were held by the Menomonic previous to concluding and signing the foregoing instrument, and that the title which they have acquired is not to interfere in any manner whatever with the lands previously acquired or occupied by the Government of the United States or its citizens.

October 27, 1823, the Secretary of War officially notified the releasees that the President distinctly wished them to understand that by this partial sanction he did not mean to interfere with, nor in any manner invalidate, their title to all the lands which they had thereby acquired, including those not confirmed by the Government, but, on the contrary, he considered their title to every part of the country conveyed to them by the releasors as equally valid against them; and that what they had done was with the full assent of the Government.

14 Of the consideration above mentioned, \$1,000 were paid by the Stockbridges and Munsees, while \$1,000 were to be paid by the Oneidas, Tuscaroras, and St. Regis in one year from September 23, 1822, and \$1,000 in two years from that date. Of the two latter amounts \$1,000 appears to have been paid by the United States out of the funds of the St. Regis about 1825, while \$950 were paid by the Brothertown tribe September 18, 1824. In consideration of which the releasees, by an agreement with the Brothertowns under date of January 8, 1825, ceded to them a small separate tract by metes and bounds, and, after reserving to themselves, for each tribe of the releasees, a similar tract from out of the country purchased from the releasors, granted to the Brothertowns an equal undivided part of all the remaining portion of said purchase. It does not appear whether the Oneidas and Tuscaroras paid any part of the above consideration.

IV.

The grants set forth in findings II and III include the lands subsequently ceded by the Menominees to the United States by the treaties of August 11, 1827, and February 8, 1831.

V.

Thereafter some New York Indians belonging to the Oneida, St. Regis, Stockbridge, Munsee, and Brothertown tribes removed to and took possession of the lands in Wisconsin.

Later and after 1832 another small portion of the New York Indians removed to the Wisconsin or Green Bay lands.

March 14, 1840, the Senecas denied ownership of Wisconsin lands, stating that they determined to have no other home than that of their fathers where they then resided, and in May and September following, in petitions to the President, the Senate, and the House of Representatives, their council denied that they were parties to the treaty.

VI.

It does not appear that application was made by the tribes or bands or any of them to the Government for removal to the Kansas

provided for in the Buffalo Creek treaty except as hereafter appears in these findings.

It does not appear that any substantial number of Indians wished to go to Kansas other than those who made up the Hogeboom party.

VII.

In the year 1838, at the time of the negotiation of the treaty of Buffalo Creek, the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras, and the St. Regis each possessed a reservation in the State of New York on which members of the tribes resided and the right of occupancy of which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home and resided upon the reservation and lands possessed by the Seneca nation; this they did with the consent of the Senecas, and the Onondagas did the same.

VIII.

The lands occupied by the Seneca nation in the State of New York consisted of four separate and distinct reservations, namely: the Buffalo Creek reservation in Erie county, containing 49,920 acres; the Cattaraugus Creek reservation, containing 21,680 acres; the Alleghany reservation, containing 30,469 acres, and the Tonawanda reservation, in Genesee county, containing 12,800 acres. The lands occupied by the Tuscarora Indians were situated in Niagara county, N. Y., and comprised 6,249 acres. The lands occupied by the Onondaga tribe were situated in Onondaga county, and comprised 7,300 acres. The lands occupied by the Oneida were situated in Oneida and Madison counties, N. Y., and comprised 400 acres. The reservation and lands occupied by the St. Regis tribe were situated in Franklin county, N. Y., and comprised about 14,000 acres.

IX.

Many years prior to the treaty of Buffalo Creek (of 1838) the various nations or tribes of Indians had improved and cultivated their lands on which they resided and from the products of which they sustained themselves.

The treaty of Buffalo Creek, as printed in the seventh volume of Statutes at Large, contains a misprint on the third line of page 1. The word "Oneidas" is in the original treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation."

X.

Extract from Executive Journal of June 11, 1838.

The Senate resumed, as in Committee of the Whole, the consideration of the treaty with the New York Indians, and the article supplemental thereto.

On
tion w
Comm
years 3

No
ported
curre

Mr
embra
adopt

Res
Senate
conclu
of Jan
comm
men, a
assem

Stri

(line 1
" T
the P
to div
severa
their
regula
or by

Ins
" T
nation
States

16

the 2
said
or bar
tribes
vey to
may
by a
the tr

Str
word

Str
2d an

" I
arran
Osage
India
the w

on motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the committee on Indian Affairs, and determined in the affirmative, 33.

* * * * *

no further amendments having been made, the treaty was referred to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo Creek, in the State of New York, the 15th day of January, in the year of our Lord 1838, by Ransom H. Gillett, a Commissioner on the part of the United States, and the chiefs, head men, and warriors of the several tribes of the New York Indians, assembled in council, with the following amendments:

Strike out of article 2, after the word "computed," in line 29 of article 18, art. 2, 7 Stats., 551), the following words:

"To have and hold the same in fee-simple forever, by patent from the President of the United States, with full power and authority to divide the same among the members of the different tribes, in severalty, with power and authority to sell among each other and their Indian brethren of the Indian Territory, under such laws and regulations as may be adopted by the respective tribes themselves, by a general council of the New York Indians."

Insert the following in lieu of the above stricken out:

"To have and to hold the same in fee-simple to the said tribes or bands of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, bands of New York Indians, or among the members of said tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively."

Strike out in line 45, of the 2d article, (line 3, 7 Stat., 552), the words "and at Green Bay."

Strike out after the word "annexed," in line 48, the residue of the article, in the following words:

"It is further agreed that if the United States, by any future arrangement, can procure the Cherokee tract lying between the large lands and the State of Missouri, that then the New York Indians shall have the same, and a like quantity is to be taken off the western end of the tract herein set apart for the New York

Indians. And in order to convince the New York Indians of the great desire of the United States to gratify their wishes, it is agreed that the President shall invite a delegation of the Cherokees, and also a delegation of the New York Indians, to assemble at the city of Washington to participate in the negotiations for the said Cherokee country, the expense of which shall be borne by the United States. It is agreed that the New York Indians shall confer on their delegates such powers as shall be necessary to relinquish the lands proposed to be given in exchange with the Government for the Cherokee lands, and such other powers as each tribe may confer, relating to the interest of itself."

Strike out the third, fourth, fifth, and sixth articles, in the following words:

"Article 3. The United States stipulate and agree to remove all the New York Indians of the several tribes described in the foregoing article to their new homes and to supply them with provisions for one year after their arrival there. But if any chief, who shall be, in the opinion of the agent, competent to take care of and remove himself and family in his own conveyance or otherwise, wishes to do so, he shall be allowed that privilege, and he shall be allowed the same compensation for each person so removed as it would cost the United States, which shall not be less than twenty dollars for each person so removed. And any chief who shall be, in the opinion of the agent, competent to act as a subagent in the removal of his party, and does actually remove them, shall be paid at the rate of five hundred dollars for every party of one hundred persons so by him removed, and in the same ratio, be the number more or less. It is understood that when any chief gives notice to the agent of the Government that he and his party are ready to remove, that the means shall be furnished for that purpose by the Government, and a disbursing agent shall accompany them. It is further agreed that such Indians as prefer to remove by land with their own conveyances shall be permitted to do so, and those who are removed by the Government shall have every attention paid to their health and comfort, by having good and sufficient conveyances for their accommodation, and a physician to accompany each party of emigrants, if they desire it. It is agreed that the Indians shall be permitted to commute their one year's support for such a sum as the rations would cost the Government at their new homes.

"Article 4. It is further agreed that the United States will erect in the country set apart for the New York Indians, for the use of the respective nations, as many council-houses, churches, school-houses, saw-mills, grist-mills, and blacksmith shops, not to exceed one for each nation, except where otherwise specially provided, as shall be necessary and desired by the said nations. But in case any portion of any tribe removes then a proper proportion of the above-mentioned buildings are to be erected. It is further agreed that the United States shall pay suitable teachers, millers, and blacksmiths, and furnish the necessary coal, iron, steel, and blacksmith's tools, for ten years, and as much longer as the President shall deem proper.

"Article 5. It is expressly agreed that if, in the opinion of the President of the United States, he shall hereafter deem it proper to locate the seat of government for the Indian Territory within the territory set apart for the New York Indians, that then he shall be at liberty to select a tract, not to exceed a township, for that purpose, which shall be excepted from the foregoing grant and remain the property of the United States; and there shall be added to the territory set apart for the New York Indians a quantity of land which shall be equally valuable.

"Article 6. The United States, taking a deep interest in the improvement of the Indians in useful knowledge, and believing that a literary institution for their instruction in the higher branches of education, to be established in the Indian Territory, will be highly beneficial to the Indians, hereby stipulate to set apart for that purpose as a permanent fund the sum of thirty thousand dollars, to be invested in some safe stock by the President of the United States, the income of which shall be applied to the purchase of 17 necessary books and apparatus and the support of suitable teachers, who shall always be selected from among the Indians themselves, if persons of the necessary qualifications can be found among them. It is understood that this institution shall be organized under such rules and regulations as the President of the United States shall from time to time prescribe, and to be established at such place as shall be finally selected as the seat of government of the Indian Territory, if that shall be located within the country assigned to the New York Indians; and if not, then the said institution shall be located at such place in said country as shall be determined in a general council of the New York Indians residing there."

Strike out of article 8, after the word "Territory" in line 21 (line of art. 4, 7 Stats., 552), the following words:

"It is expressly understood and agreed that if any of the several tribes of New York Indians shall suffer depredations from any other Indian tribes residing in the Indian Territory, or from citizens of the United States, and the same is proved to be the case to the satisfaction of the agent residing among them, and the property cannot be recovered, nor satisfaction therefor obtained by such agent, that then the United States will pay the Indians so sustaining such loss for the same."

Strike out the ninth article, in the following words:

"Article 9. The United States agree to pay to the New York Indians at their new homes, each year, for five years, ten thousand dollars, in farming utensils, looms, and spinning wheels, and money to support proper persons to instruct them in the use of the same, and in domestic animals, under such regulations as shall be prescribed by the President of the United States. The rejection of this article by the Senate shall not invalidate the residue of the treaty, and the Senate shall be at liberty to modify and alter the article as they shall deem proper."

Strike out of the 11th article, in lines 5, 6, and 7 (art. 6, 7 Stats., 552), the following words:

"And the Government will have one of its agents reside among the New York Indians at the West."

Strike out of the 14th article, after the word "beginning," in line 19 (last line of art. 9, 7 Stats., 553), the following words :

"But if the President and Senate shall not ratify and confirm this reservation, then the said Williams is to receive, in lieu thereof, ten thousand dollars, and have the pre-emption right to purchase the said lands at Government price."

Strike out of the 15th article, after the word "accommodation," in line 8 (line 9, art. 10, 7 Stats., 553), the following words :

"But in case the Cherokee tract, lying east of the Osages, is obtained by the United States, that then the Senecas are to have that tract, and so much north of it, of the country set apart for the New York Indians, as shall be necessary to make the requisite quantity for them and their friends, the Cayugas and Onondagas, residing among them;" and

Strike out of the 15th article, all after the word "Fellows," in line 36 (last line of art. 10), in the following words :

"The United States also agree to build, at their new homes, for the Senecas, and their friends, the Cayugas and Onondagas, residing among them, four saw-mills and four grist-mills, four council houses, four school-houses, four churches, if they desire it, and three blacksmith shops, and one gunsmith shop, and also to provide and pay the necessary millers, teachers, and blacksmiths, and a gunsmith, for ten years and as much longer as the President of the United States shall deem proper, and the United States will also supply the necessary blacksmith tools, iron, steel, and coal for said shops during that period. It is expressly understood that the gunsmith is to do all the work for all the New York Indians who remove West and reside at their new homes."

Strike out the 19th article, in the following words :

"Special Provisions for the Oneidas at Green Bay."

"Article 19. The United States agree to pay the sum of three thousand dollars to the Orchard party of the Oneidas, at Green Bay, and the sum of thirty thousand five hundred dollars to the fir Christian party settled at that place, as a remuneration for money laid out and expended by the said parties, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and the removal to the same; the same to be apportioned and paid out to the several claimants by the chiefs and a United States commissioner as may be deemed most equitable and just. It is expressly agreed that if the Senate of the United States does not ratify and confirm the above, in relation to the Green Bay Indians, it shall not invalidate any of the other provisions of this treaty. It is expressly agreed that if any of the Indians now at Green Bay wish to remove to the country set apart as their future homes, they shall be at liberty to do so, and on relinquishing their possessions and improvements to the United States, they shall be paid the value

of said improvements; and when a sufficient number of
 18 Indians remove to their new homes to need them the United States will make the provisions for this part of the Oneida separate from those at Oneida, if they desire it, which are specified in article fourth of this treaty. This article shall not be construed to authorize the Government to compel them to remove."

Change articles 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 to articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, respectively.

Add the following as a new article:

"Article 15. The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be appropriated from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their new homes supporting themselves the first year after their removal; to encourage and assist them in education and being taught to cultivate the lands; in erecting mills and other necessary houses; in purchasing domestic animals and farming utensils, and acquiring a knowledge of mechanic arts."

Strike out Schedule D, in the following words:

"SCHEDULE D.

"The United States will pay to the persons named below the sums mentioned for them, as a remuneration for their services in procuring the Green Bay country and for services as delegates in exploring the western country, and for losses sustained in consequence thereof, and for other services, to wit:

"To George Jameson, two thousand dollars.

"To Thompson S. Harris, twelve hundred dollars.

"To Nathaniel S. Strong, one thousand dollars.

"To Seneca White, one thousand dollars.

"To Marus B. Pierce, one thousand dollars.

"To William Johnson, one thousand dollars.

"To James Young, one thousand dollars.

"To William King, five hundred dollars.

"The above-mentioned sums to be paid to the persons named above on settling at their new homes at the West.

"To William Patterson, Israel Jameson, Little Johnson, White Seneca, Silver Smith, Baptiste Pawlis, Jonathan Jourdan, Mar Daney, John Anthony, Honyost Smith, Henry Jourdan, Jan Cusick, and James Young, each the sum of two hundred dollars to be paid, when an appropriation is made, to the persons mentioned deducting the following sums which have been already advanced to them by J. F. Schermerhorn, to wit:

"William Patterson, one hundred and fifty dollars; Israel Jameson, fifty dollars; Little Johnson, sixty dollars; White Seneca, one hundred dollars; James Young, one hundred dollars; and Silver Smith, fifty dollars; which respective sums have been heretofore

And whereas the Senate did, by a resolution of the eleventh of June, one thousand eight hundred and thirty-eight, advise and consent to the ratification of said treaty with certain amendments: which treaty so amended is word for word as follows, to wit: * * *

And whereas the Senate did, on the twenty-fifth of March, one thousand eight hundred and forty, resolve "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation."

Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the eleventh of June, one thousand eight hundred and thirty-eight, and twenty-fifth day of March, one thousand eight hundred and forty, accept, ratify, and confirm said treaty, and every article and clause thereof.

In testimony whereof I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Done at this city of Washington this fourth day of April, one thousand eight hundred and forty, and of the Independence of the United States the sixty-third.

M. VAN BUREN.

By the President,

[SEAL]

JOHN FORSYTH,

Secretary of State.

XI.

The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to this subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never migrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than three years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the follow-

giving allegations: (a) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the pre-emption owners; (b) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified, the lands and improvements on the Buffalo Creek reservation, in New York, were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Alleghany reservations in New York.

XII.

Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and as shown below. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

1 In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, Aid Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of \$9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas.

XIII.

A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, and held at Cattaraugus June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The com-

missioner also reported that he held an enrollment for two full days, but that only 7 persons requested to be enrolled for emigration, and these vouched for 5 more as wishing to go.

XIV.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wis., contained 65,540 acres, all of which has been allotted in severalty and reserved for school purposes except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty. (9 Stat. L., 955; 11 Stat. L., 663, 679; 16 Stat. L., 404.) The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

XV.

Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as those of the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of said lands as were sold was at the rate of \$1.31 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about \$1.22 per acre.

XVI.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in considera-

tion of certain releases of claims under the treaties of 1838 and 1842, agreed to pay and invest, and did pay and invest, for said band the sum of \$256,000.

This sum of \$256,000 was equivalent to \$1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of \$400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

XVII.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian reserve be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and allotments were made to them. After this, and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860),
23 some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

XVIII.

Of the sum of \$400,000, agreed by the treaty of Buffalo Creek to be appropriated for the purposes mentioned therein, the sum of \$20,477.50 was appropriated, and of this, \$9,797.11 were expended, this expenditure being for the removal and subsequent care of the Indians who emigrated in 1846. Of this amount \$1,934.50 were for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling; \$5,800.29 for pay of agent for transportation and supplies on the way, and \$2,962.32 for supplies, etc. (including \$350 for medical attendance and supplies), after arrival.

The following payments were also made under the treaty:

Under article 9, \$5,000 to the St. Regis tribe.

Under article 11 and Schedule C, \$1,500 to William King, he having emigrated in 1846.

Under article 13, \$6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.

Under article 14 and Schedule B, \$125 to James Cusick, he having emigrated in 1846.

The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows,

contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to non-emigration, the Indians have received the money in New York.

XIX.

It does not appear that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of any New York Indians from Wisconsin and New York to the Kansas lands other than the Hogeboom party as hereinabove set forth.

XX.

There is evidence tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

XXI.

The following facts, agreed upon by both parties, are at their request found by the court :

It is hereby stipulated and agreed between the counsel representing the parties to this case that the court find the following statement of facts, all of which are matters of history :

First. Prior to 1786 the title to and sovereignty over the lands then occupied by the New York Indians, except as to their
 24 right of possession under their Indian title, was claimed by the States of New York and Massachusetts, respectively, and on December 16, 1786, Massachusetts ceded to New York the "government, sovereignty, and jurisdiction" over the disputed territory, while "the right of pre-emption of the soil from the native Indians" was divided territorially between the two States, New York acquiring an absolute right of pre-emption in a territory which included what afterwards became known as the Oneida, Onondaga, and St. Regis reservations, and Massachusetts acquiring a similarly absolute right in the territory which included what were afterwards known as the four Seneca reservations and the Tuscarora reservation. (See stipulation, filed October 16, 1894.)

The agreement by which the said concessions were made by the said parties is contained in an instrument in writing, made and executed by and between the said States at the city of Hartford, in the State of Connecticut, on the 16th day of December, in the year of our Lord 1786, a copy of which agreement is recorded in the office of the county clerk of the county of Cattaraugus, State of New York, in Liber one, at page 270-280, to which record reference is here made, and either party is at liberty to read the whole or any part thereof on the hearing of this case. The Indian title and right of possession to a part of the said territory was afterwards bought and extinguished by certain grantees of Massachusetts in the year 1789.

The pre-emption right and estate of Massachusetts in the remaining part of these lands was granted by the said State to Robert Morris May 11th, 1791, and by him to the trustees of the Holland Land Company in the year 1793, except as to the land known as the "Morris reserve," and from time to time the Indian title as to the various tracts was extinguished by these parties. But this relinquishment of the Indian title did not include the lands and reservations occupied by the Seneca and Tuscarora Indians mentioned and referred to in the treaty of 1838.

The Tuscaroras came from North Carolina prior to the Revolutionary war and formally united themselves with the confederacy of the New York Indians, known at that time as the Iroquois Confederacy, and were assigned to and resided upon the territory of the Oneidas, and thereafter the Iroquois Confederacy became known as the Six Nations; and prior to 1788 the Tuscaroras commenced a settlement by themselves on lands which they now occupy, located in the county of Niagara, and obtained an Indian title to 1,920 acres of land from the Seneca nation of Indians and the Holland Land Company.

In 1804 the Tuscaroras purchased with their own moneys 4,329 acres of land lying adjacent to the tract of land last mentioned, and they now own and occupy the last-mentioned tract in fee-simple; and the said two parcels of land comprise the 6,249 acres of land mentioned and referred to in the 11th finding of fact in Congressional case No. 151 as being occupied by the Tuscarora Indians.

In 1810 the Holland Land Company conveyed to David A. Ogden its estate and property in the Buffalo Creek, Cattaraugus, Alleghany, Tonawanda, Tuscarora, and Caneadea reservations, in all 196,335 acres, subject only to the right of the native Indians to occupy and possess the same under their Indian title.

On August 1st, 1826, the Seneca nation sold to Thomas Ludlow Ogden and others, trustees of the Ogden Land Company, the Caneadea, Canawaugus, Squawky Hill, and Big Tree reservations and parts of the Buffalo Creek, Cattaraugus, and Tonawanda reservations, and surrendered possession of the same; but this sale and surrender of lands did not include any of the lands and reservations mentioned and described in the treaty of 1838 and also in the 11th finding of fact in Congressional case No. 151.

Second. The provisions of the treaty of Buffalo Creek of 1838, whereby the Tuscaroras sold to Ogden and Fellows a part (including the 1,920 acres) of their reservation and conveyed the balance to the United States in trust for sale on their account, were never followed by any surrender of possession by the Tuscaroras, or payment of the purchase-money by Ogden and Fellows, or any sale of any part of the reservation by the United States, and the Tuscaroras have continued to hold and occupy their entire reservation as before described ever since. The terms and conditions of the sale to Ogden and Fellows and the object and purpose of the same are set forth in article 14 of the treaty of 1838, and the form of the deed made and executed by the Tuscaroras is attached to the said treaty of 1838 and published therewith, to which reference is here made; and said

article 11 and copy of the deeds thereto attached may be read by either party on the hearing.

Third. The Tonawanda band of the Senecas did not, on the execution of the treaties of 1838 and 1842, surrender up the possession of their reservation to Ogden and Fellows under the provisions of the treaties of 1838 and 1842, and when the said Fellows and others proceeded to dispossess one of this band of a part of the reservation an action of trespass *quare clausum fregit* was brought by the Indians, sought to be dispossessed and a judgment rendered in favor of the plaintiff therein in the supreme court of the State of New York, which judgment was affirmed by the court of appeals of the State of New York, and on appeal to the Supreme Court of the United States the judgment of the court of appeals of the State of New York was affirmed, and the facts and circumstances of the case are stated and set forth in the case entitled Joseph Fellows, survivor of Robert Kendle, plaintiff in error, against Susan Blacksmith and Eli S. Parker, adm'rs of John Blacksmith, deceased.

This case is reported in the 19th of Howard, page 366, to which case so reported reference is made for the facts and circumstances of the case upon which the said several judgments were based.

Fourth. The Oneidas of New York sold and conveyed to the State of New York a further portion of their lands within the State, retaining 350 acres, upon which a portion of the Oneidas now reside; and in 1848 and prior thereto a large number of the said tribe removed to the State of Wisconsin and settled upon that portion of the Green Bay lands which have been occupied by others of the tribe prior to 1838 and which was excepted from the operation of article I of the treaty of 1838.

J. E. DODGE,

Assistant Attorney General, for Defendant.

GUION MILLER,

For Claimants.

Conclusion of Law.

Upon the foregoing facts the court find as conclusion of law that the petition be dismissed.

25

IV.—Opinion.

DAVIS, J., delivered the opinion of the majority of the court:

What were known in 1784 as the "New York Indians" consisted of six nations or tribes, called Senecas, Ononagagas, Cayugas, Tuscaroras, Oneidas, and Mohawks. The Mohawks soon after left the United States for Canada, and in 1797 relinquished by treaty all claims to land in New York. (Treaties of 1784, 1789, and 1797, Stat. L., 15, 33, 61.)

The title to the lands occupied by the New York Indians in New York was prior to 1786 claimed both by New York and Massachusetts, which agreed in 1786 that New York should exercise "government, sovereignty, and jurisdiction" of the territory, while Mass

Massachusetts reserved "the right of pre-emption of the soil from native Indians" in certain named parts of the State, the right of pre-emption as to the rest of the territory being relinquished to New York. The pre-emption rights of Massachusetts were afterwards (in 1791) granted to Robert Morris and by him were transferred (except as to one tract) to the Holland Land Company.

By various treaties between the United States and the Indians the latter were secured in their right to the lands upon which they were settled and whose boundaries were fixed. In one of these treaties, that of 1794, the United States engaged that they would never claim the lands or disturb either of the Six Nations or their Indian friends united with them in the free use and enjoyment of the lands, but that the Indians should remain upon the lands until they chose to sell them to the United States, the Six Nations upon their part agreeing not to claim any other lands within the United States.

Beginning in 1810, a movement appears to have been made for the removal of the New York Indians to the northwest, and, with the approval of the United States Government, they purchased from the Menomonic and Winnebago tribes lands in Wisconsin. This transaction was completed in 1823, and thereafter some of the New York Indians removed to Wisconsin. Dispute there arising between them and the Menomonies, fresh agreements were concluded by the Government, and the Indian rights in the Wisconsin lands were recognized by the President and the Congress.

The treaty with the Menomonies, assented to by the New Yorks, provided that the lands in Wisconsin should be held under such tenure as that by which the Menomonies had before held them, "subject to such regulations and alterations of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

It therefore appears from the treaties and the findings that prior to February, 1831, plaintiffs, with the approbation of the President, had purchased from the Menomonic and Winnebago Indians some rights in land in Wisconsin, near Green Bay; that questions had arisen in relation to this purchase which were finally settled by a treaty between the Menomonies and the United States, ratified in 1832.

26 Coming now to January, 1838, we find that relatively few New York Indians had emigrated to Wisconsin; but the reasons why they had not done so were satisfactory to the President, who had the right to prescribe the time of removal. Prior to this, however, some of the New York Indians had asked that their Wisconsin lands should be taken by the Government and a new home provided for them in the West. Thereupon the treaty of January 15, 1838, known as the treaty of "Buffalo Creek," was negotiated, and after amendment by the Senate was proclaimed by the President.

Upon this treaty plaintiffs found the alleged rights which they seek to enforce here, and the claim presented, as defined by the special statute, is that of the New York Indians (being those Indians who were parties to the treaty of Buffalo Creek) against the United

States growing out of the unexecuted stipulations of said treaty on the part of the United States.

The situation when this treaty was signed was briefly this: The Indians had rights in lands in New York and in Wisconsin, and these rights had value; relatively few Indians had emigrated to Wisconsin, and the reasons for so small an emigration were satisfactory to the President; a desire had been expressed by some of the New York Indians to go west with a willingness to surrender their lands in Wisconsin for lands west of the Mississippi; the United States were glad of an opportunity to pursue their policy of moving all Indian tribes westward.

It was, therefore, in substance agreed in the treaty that the Indians cede to the United States all their rights in the Wisconsin lands (except a small reservation); that the United States set apart for them a permanent home west of the Mississippi upon a tract described by metes and bounds; this land the Indians were to hold in conformity with section 3 of the act of May 28, 1830, the tract to be divided among the different tribes, nations, or bands in severalty in proportion to population, with some special provisions as to certain tribes. The United States agreed to protect the Indians in their new home and agreed that the land "should never be included in any State or Territory of the Union." The United States agreed to pay certain sums to the different nations and tribes on their removal west. The United States agreed to appropriate \$400,000 for the expenses of removal, and also to assist the Indians in various ways in beginning life in their new home.

The defendants have complied with the specific obligations assumed by them under this treaty to this extent alone. In 1846 they removed some 200 or more Indians to the new reservation (all, apparently, who wished to remove), and paid therefor the sum of \$9,461.08; they allotted to 32 of these Indians 10,240 acres of land; in 1857 they secured from the Tonawanda band of the Senecas a release of all their rights under the treaty and in the lands, and paid them for this the sum of \$256,000. In no other way, so far as appears, have the United States attempted to carry out their obligations under the treaty of Buffalo Creek.

We have given a concise statement of the situation existing when the treaty of Buffalo Creek was negotiated, as we understand it. Our knowledge of this situation is chiefly gleaned from treaties, their recitals, their appendices, and the official action of duly authorized agents of Government in relation to them. Some

27 further facts appear in the findings, but generally the history of the relations of these tribes to the Government and the situation, political and contractual, in 1838 is deduced from the treaties themselves and their appendices, which we will now examine more carefully.

In 1784 the United States by treaty secured the Oneida and Tuscarora nations in the possession of the lands upon which they were settled, and fixed the boundaries of the lands of the Six Nations, it being agreed by the United States that the Six Nations should

be secured in the peaceful possession of the lands they then inhabited east and north of the boundaries fixed.

The stipulations of this treaty were renewed and confirmed in 1789, when the boundary was again described in the same terms as in the treaty of 1784, and the Indians relinquished and ceded to the United States the lands west of the defined boundary. The Mohawks were not parties to the treaty of 1789.

In 1794 another treaty was concluded with the Six Nations, guaranteeing peace and friendship perpetual between the parties, acknowledging the lands reserved to the Oneida, Onondaga, and Cayuga nations in their treaty with the State of New York to be their property, engaging that the United States would never claim the same or disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof, and agreeing that the said lands should remain theirs until they chose to sell the same to the United States, who "have the right to purchase." The land of the Seneca nation is also described by metes and bounds in this treaty, acknowledged as their property, confirmed as theirs until they chose to sell to the United States, who "have the right to purchase." The United States having thus described and acknowledged the lands of the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same nor disturb the Six Nations in the free use and enjoyment thereof, the Six Nations upon their side agreed never to claim any other lands within the boundaries of the United States.

In 1810 some of the New York Indians petitioned the President for leave to purchase reservations of their Western brethren, with the privilege of removing to them and occupying them. Thereupon, with the approbation of the President, land at Green Bay, Wis., was bought by them from the Menomonies and Winnebagoes.

Eleven years later the Menomonies ceded to the Stockbridge, Tuscarora, St. Regis, and Munsee nations, for a small money consideration, two tracts of land in Wisconsin. The title to these tracts was confirmed by the President in March, 1823.

Later, Indians belonging to the Oneida, St. Regis, Munsee, and Brothertown tribes moved to the Wisconsin lands, and questions arose which resulted in the treaty of 1831.

In this treaty (7 Stat. L., p. 342) the Menomonies, after denying that they had sold any lands, make the following statement:

"For the purposes, therefore, of establishing the boundaries of their country and of ceding certain portions of their lands to the United States, and in order to secure great and lasting benefits to themselves and posterity, as well as for the purpose of settling the long-existing dispute between themselves and the several tribes of

New York Indians who claim to have purchased a portion
28 of their lands, the undersigned * * * stipulate and agree with the United States as follows," etc. It will be noted that the agreement is with the United States; that any rights in the New York Indians to Menomonic lands are denied (see article I); but the Menomonies do agree, at the solicitation of the President, that such lands, within certain boundaries, as he may

direct, "may be set apart as a home to the several tribes of the New York Indians who may remove to and settle upon the same within three years from the date of this agreement." Further on in the same article occurs this paragraph:

"The country ceded to the United States for the benefit of the New York Indians contains by estimation about 500,000 acres. * * * As it is intended for a home for the several tribes of the New York Indians who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time. * * * And if at the time of such apportionment any lands should remain unoccupied by any tribe of New York Indians, such portion as would have belonged to such Indians had it been occupied shall revert to the United States. * * * It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes under such tenure as the Menomonic Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

For this "cession to the United States for the benefit of the New York Indians" the sum of \$20,000 was to be paid. It was also stipulated that such part of the treaty as relates to the New York Indians should be immediately submitted to them, and if they refused to accept the provision made for their benefit and to move to the lands set apart for them on the west side of Fox river, that their immediate removal from the Menomonic country be directed. (*Ibid.*, p. 345.)

Nine days later (February 17, 1831) an amendment to the treaty was signed, induced by certain reasons, one of which was "to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States;" so it was agreed that such part of the first article of the treaty as limits the removal and settlement of the New York Indians to three years shall be altered so that the President shall prescribe the time for removal and settlement. No limit is put upon that time.

To the arrangement made by this treaty the New York Indians assented, and thereafter the title to the land described in the treaty has been thus recognized by the Congress and the President as in the New York Indians; in the treaty with the Menomonies of September 3, 1836; in the treaty with the Stockbridges and Munsees of September 3, 1839, and in the treaty with the Tonawanda band of Senecas of November 5, 1857.

It therefore appears that prior to February, 1831, the plaintiffs, with the approbation of the Government, had in legal effect purchased from the Menomonic and Winnebago Indians certain rights in Wisconsin lands; that questions had arisen between them and the Menomonies which were finally settled by a treaty between the Menomonies and the United States, ratified in 1832; that this

29 treaty contained a provision securing to the New York Indians, in consideration of \$20,000, paid by the United States, 500,000 acres of land at Green Bay, on condition that they should remove to the same within three years or such reasonable time as the President of the United States should prescribe; and the United States set apart out of another tract of land, acquired by the same treaty, three townships for the Stockbridge, Munsee, and Brothertown tribes. It further appears that in January, 1838, no substantial number of the plaintiffs had removed to the Wisconsin lands, but they had been prevented from doing so by reasons accepted as sufficient by the President. (Treaty of 1838, vol. 7, Stat. L., p. 550.) Prior to this date, however, some of the New York Indians had applied to the President to take their Green Bay lands and provide them a new home in the Indian Territory. Pursuing the Government policy in removing the Indians to the west of the Mississippi, the President acted upon this application; the treaty of Buffalo Creek, dated January 15, 1838, was signed, and after amendment was consented to and proclaimed.

The treaty of Buffalo Creek provides (in consideration of certain premises and of the covenants contained, in the treaty itself, to be performed by the United States) that the New York Indians cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First. To set apart as a permanent home for the plaintiffs a certain tract of country west of the Mississippi river (described by metes and bounds), to include 1,824,000 acres of land, to be held in fee simple by the said tribes or nations of Indians by patent from the President of the United States, in conformity with the provisions of section 3 of the act of Congress of May 28, 1830, entitled "An act to provide for an exchange of lands with the Indians residing in any of the States and Territories and for their removal west of the Mississippi, the same to be divided among the different tribes, nations, or bands in severalty," it being understood that the said country was intended as a future home for the following tribes: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns; and was to be divided equally among them, according to the number of individuals in each tribe (as set forth in a schedule annexed to the treaty and designated as Schedule A), on condition that such of the plaintiffs as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. The following is the Schedule A:

Census of the New York Indians as Taken in 1837.

Number residing on the Seneca reservations:

Senecas.....	2,309
Onondagas.....	194
Cayugas.....	130
	<hr/>
	2,633
Onondagas at Onondaga.....	300
Tuscaroras.....	273
St. Regis in New York.....	350
Oneidas at Green Bay.....	600
Stockbridges.....	217
Munsees.....	132
Brothertowns.....	360

30 Second. The United States agreed to protect and defend the plaintiffs in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to plaintiffs by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of Indians hereinafter mentioned, on their removal west, the following sums, respectively, namely: To the St. Regis tribe, \$5,000; to the Seneca nation, the income annually of \$100,000, being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States; to the Cayugas, \$2,500 cash and the annual income of \$2,500; to the Onondagas, \$2,500 cash and the annual income of \$2,500; to the Oneidas, \$6,000 cash, and to the Tuscaroras, \$3,000.

Fifth. The United States agreed to appropriate the sum of \$400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the plaintiffs in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils and in acquiring a knowledge of the mechanic arts. By supplemental article the St. Regis Indians assented to the treaty adding this stipulation, viz:

"And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove."

The treaty of January 15, 1838, as amended by the Senate June 11, 1838, was assented to September 28, 1838, by the Seneca tribe of New York Indians; August 9, 1838, by chiefs of the Oneida tribe;

August 14, 1838, by the Tuscarora nation residing in New York ; August 30, 1838, by Cayuga Indians residing in New York ; October 9, 1838 (with the reservation above noted), by the St. Regis Indians residing in New York ; August 31, 1838, by the Onondaga tribe of Indians on the Seneca reservations in the State of New York.

The date of the acceptance of the treaty as amended by the Senate June 11, 1838, by the following tribes: Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, Brothertowns, does not appear, but the court is of opinion, and so holds, that they did accept, and this for the following reasons:

The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty with the Senate amendments be submitted and explained to each of the tribes or bands separately and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it and the President should thereupon make a proportionate reduction from the \$400,000 fund and the quantity of land provided for west of the Mississippi. Later when the treaty was again before the Senate, a resolution was passed

31 which in substance provided that when the President should be "satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty" with the New York Indians according to the first resolution, then the President might proclaim the treaty and carry it into effect. It is apparent at this point that, except the Senecas, all the New York Indians, in the Senate's opinion, had assented to the amended treaty. This second resolution was adopted March 2, 1839. A year later (March 25, 1840) the Senate passed this resolution:

That in the opinion of the Senate the treaty between the United States and the Six Nations of the New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to, approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation.

Thereupon followed the President's proclamation, wherein we find the following recitals:

Whereas a treaty was made and concluded at Buffalo, * * * by * * * a commission on the part of the United States and the chiefs, head men, and warriors of the several tribes of New York Indians assembled in council; and whereas the Senate did * * * advise and consent to the ratification of said treaty with certain amendments; * * * and whereas the Senate did (pass the resolution of March 25, 1840 (*supra*)): Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do (pursuant to the two Senate resolutions (*supra*)) accept, ratify, and confirm said treaty, and every article and clause thereof, * * * (dated April 4th, 1840).

It therefore appears that the question of assent on the part of all

the parties was maturely considered by the treaty-making power at the time, and that power in both its branches was convinced, and so decided, that all the New York Indians had assented to the treaty as amended. Behind that authoritative decision we are not disposed to look, even if we have the power to do so.

That we have not the power has already been thus decided :

An objection was taken on the argument to the validity of the treaty on the ground that the Tonawanda band of the Seneca Indians was not represented to the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is that the treaty, after being executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress. (*Fellows v. Blacksmith*, 19 Howard, p. 372.)

Further, the United States, having decided that the treaty was properly executed, cannot now say, in this action, that the Indians did not assent to it.

While this treaty of 1838 was being negotiated the Six Nations had a valuable interest of some kind in many acres of land in the State of New York. The nature of this interest is not important in this case ; it is enough for our purposes that it had value.

The Indians had also an interest in lands in Wisconsin, the technical legal character of which it may be difficult to define in the language of the common law, but which afforded substantial consideration for any contract with the Government.

It does not seem to us necessary to examine the quality or value of their rights in these lands. This question of the Indian tenure has been so frequently the subject of judicial, legislative, and executive consideration and determination that we can subserve no useful purpose by re-examining and discussing it. Sufficient for the purpose of this action is it that the Indians had substantial rights to barter in any contract they might make with the Government in regard to the surrender of any part of their tenure and in agreeing to move west of the Mississippi and to surrender their Wisconsin rights the Indians furnished a sufficient consideration for the contract of 1838. That agreement is sustained as a valid agreement, having all the necessary elements of a binding contract. It has long been decided that treaties between the Government and the Indians are to be treated as contracts. (*Foster v. Neilson*, 2 Peters, p. 314 ; *Head-money cases*, 102 U. S., p. 540.) The amount and sufficiency of the consideration it is no part of our duty to consider. We should not and we cannot decide whether the bargain was more advantageous to the plaintiffs or to the defendants. No fraud is shown by the plaintiffs, nor undue influence, nor intimidation, nor mistake. It only remains for us to see whether any rights secured by the treaty have been violated.

We reach now the main point in this litigation, which substantially turns upon the duties imposed by the provisions of the treaty which set apart certain lands in Kansas for plaintiffs, to be divided equally among them, according to a certain schedule, on condition

that such of them as shall not accept and agree to remove to the country set apart for them within five years, or such other time as the President may from time to time appoint, shall forfeit to the United States all interest in the lands set apart; upon the provisions which contain an agreement that the United States shall protect and defend the plaintiffs in their new homes, and secure their right to establish their own government, and upon the provisions which stipulate that the Kansas lands secured by the treaty shall never be included in any State or Territory of the Union; upon the provisions which promise to pay a certain fixed sum to each of several of the tribes on their removal west, and to appropriate \$400,000 to be applied to aid plaintiffs in removing, to support them for a year after removal, and to aid them in various ways.

The President has fixed no time for removal; few of the Indians have been removed; the lands secured to plaintiffs by the treaty have become part of the State of Kansas, turned into the public domain, surveyed and sold, and a small part only of the appropriation of \$400,000 has been made.

There was one exception to this general statement: In 1845 Abram Hogeboom represented to the Government that a number of the New York Indians desired to remove to the Kansas lands. To aid in the accomplishment of this wish Hogeboom was appointed special agent of the Government. He reported 271 as mustered for emigration. Some of these did not leave New York, and 191 only arrived in Kansas. This was in June, 1846. Later, 17 other Indians arrived; 62 Indians are known to have died and 17 to have returned to New York. Of all these Indians, only 32 received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty of Buffalo Creek, the allotment being at the rate of 320 acres each, or 10,240 acres in all.

The Kansas lands then have been sold or otherwise disposed of by the Government for a consideration, and the Tonawanda
33 band of the Senecas alone of all the New York Indians have received money compensation for a failure, real or alleged, on the part of the United States to fulfill their part of the contract of 1838. To that band has been paid by direction of the Congress a considerable sum upon the consideration of the release by them of claims upon the United States to the lands west of the State of Missouri, of all claim and right to be removed thither, for support and assistance after removal, and all other claims against the United States under the treaties of 1838 and 1842. In addition to this payment to the Tonawandas, \$9,461.08 was expended in the removal to Kansas of the two hundred or so Indians above mentioned, and the substantial result of the transaction is that the New York Indians remain in New York; that they have lost the Kansas lands, and have received from the defendants in this action, The United States, some lands in Wisconsin, the sum paid the Tonawandas, the sum paid in the removal of the Hogeboom band, and the relatively small grants in Kansas.

It is contended that the Indians by their quiescent attitude in not demanding a transfer west, or in the active opposition of the tribes

to such a transfer, have forfeited any rights they may have had in the Kansas lands. Upon the following article of the treaty this contention substantially rests:

Article 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States. (7 Stat. L., p. 552.)

The emigration west was to take place within five years, or such other time as the President might appoint, and might appoint not at any fixed period, not once for all, but "from time to time." The intent, then, of the article was not that there should be a wholesale emigration of the tribes, but that the emigration should occur at convenient periods, in such way as the President, in his wisdom, might see fit to direct, either within five years or later. The subject-matter of the removal was left to the discretion of the President, and this discretion was not limited to a period of five years, nor to any other period. As to this nothing can be said which would be clearer than the words of the treaty, "agree to remove * * * within five years, or such other time as the President may from time to time appoint."

It therefore seems to us unimportant when the five years began to run, but as matter of interest it may be noted that the treaty was first proclaimed April 4, 1840. It was afterwards amended and again proclaimed August 26, 1842, while prior to November 24, 1845, some of the Indians had applied to the War Department, under whose care they then were, for the proper steps to be taken for their emigration. Prior to November, 1845, the department had not deemed it expedient to enter into any arrangement for this purpose nor until it was assured that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

The treaty of 1838 was designed to release the eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites. The Wisconsin lands were becoming a matter of concern to the Government in the face of emigration westward, and until the Indian tenure (whatever may have been its quality) was extinguished these lands were debarred from settlement. In the removal of the Indians west the defendants had a political and no financial interest, for they had no property rights in the plaintiffs' New York lands and acquired none.

It was the right of the Government, given it expressly by treaty, to cause the Indians' removal; but it never attempted to enforce that right either by fixing a time for removal or by fulfilling the obligation imposed upon them by the fifteenth article, to appropriate \$400,000 to be applied by the President for certain purposes, the first of which was, "to aid them (the Indians) in removing to their homes and supporting themselves the first year after their removal." Many of the Indians did not wish to go to the new country; it may be assumed that without Government aid, by way not only of

money but in counsel and leadership, they could not go; it may well be doubted whether these Indians had a right to make the pilgrimage to Kansas by their own initiative, without the President's permission, and without the protection and care of Government agents. The duty of protection was imposed upon the Government, the relations were those of a superior to an inferior, the parties were not on equal footing, "and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws." (*Choctaw Nation v. United States*, 119 U. S., pp. 27, 28, and cases cited.)

We have already seen that the Supreme Court holds that no time was fixed for removal (*Fellows v. Blacksmith*, *supra*), where the court said: "We hold that the performance of the conditions of the treaty was not a duty that belonged to the grantees, but to the Government under the treaty."

It is urged that under the third article (of the treaty of 1838) the action, or rather nonaction, of the Indians had worked a forfeiture of their Kansas interests. That article provides that those tribes who do not "accept and agree" to remove, and to remove within five years or such other time as the President may from time to time appoint, shall forfeit all interest in the lands. If we are to be purely technical, then there is no forfeiture, for two reasons: First, that all the tribes agreed to the treaty, hence all accepted it and agreed to remove; and, second, the President has not yet fixed any time or times for such removal. Beyond this, however, is the other point that article 15, which should be read with article 3, (as it relates to the same subject-matter), requires the United States to provide the funds for this wholesale removal, which they have never done in sufficient amount.

A forfeiture at most could be only based upon a refusal by the Indians to emigrate, and we do not find that such a refusal was affirmatively made, although undoubtedly and naturally there was a strong disinclination on the part of the Indians to leave their New York homes for a distant and unknown country. "An interpretation which creates a forfeiture is not to be favoured" (*Johnson v. Toppin*, 1 Wendell, p. 388), and especially where a party to an agreement for an exchange of lands has secured the first possession of the premises assigned to him in the contract. (1 Barbour, p. 634.)

The Government could have enforced the removal; but it not only took no step to that end, but failed to provide the means required of it by the treaty to pay for the removal; it has been quiescent, tacitly assenting to the existing conditions, and the Indians have not urged a removal.

When this action was begun, and for years before, the United States were unable by reason of their own acts to carry out the agreement of 1838. The Government had disposed of the lands in Kansas; these have for many years been occupied by settlers, and villages and towns have sprung up upon them. Under such circum-

stances any formal demand at this time by the Indians for a return of the Kansas lands would be a vain and useless form. The lands they can never recover, and to them the Indians can never be removed. Their only remedy is in a money judgment if they have been wronged. The value of the land as fixed in that treaty we have found as the reasonable value in this case.

As any rights to be enforced in this action rest principally upon the treaty of Buffalo Creek we must consider that instrument somewhat more fully.

As to the parties to the treaty some question has been made. In the amendments to the treaty made by the Senate July 11, 1838, the Indians are spoken of as "the New York Indians of the several tribes described in the foregoing article" and the tribes described in the "foregoing article" (the third article) are the "several tribes described in the foregoing article," to wit, the second article. Turning now to the second article we find the grant to be to "all the New York Indians now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes" and the article thus concludes:

It is understood and agreed that the above-described country (the Kansas lands described as situated directly west of the State of Missouri) is intended as a future home of the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, residing in the State of New York and the same to be divided equally among them according to their respective numbers, as mentioned in a schedule hereto annexed.

Further on in the treaty we find special provisions made for the following tribes or special mention made of them, to wit: The Oneidas, Senecas, St. Regis, Cayugas, Onondagas residing on the Seneca reservation, Oneidas residing in the State of New York, and the Tuscaroras, while the treaty is signed by representatives of the following tribes: Senecas, Tuscaroras, Oneidas residing in the State of New York for themselves and their parties, Oneidas at Green Bay, St. Regis, Oneidas residing on the Seneca reservation, principal Onondaga warriors in behalf of themselves and the Onondaga warriors, Cayugas, principal Cayuga warriors in behalf of themselves and the Cayuga warriors; and in the census annexed to the treaty (as Schedule A) are named the Senecas, Onondagas, Cayugas, Onondagas at Onondaga, Tuscaroras, St. Regis in New York, Oneidas at Green Bay, Oneidas in New York, Stockbridges, Munsees and Brothertowns, while Schedule C is applicable only "to the Onondagas and Cayugas residing on the Seneca reservations."

36 Later (February 13, 1838, 7 Stat. L., 561) the St. Regis Indians "having heard a copy of said treaty (of Buffalo Creek) read by Ransom H. Gillet, the commissioner who concluded that treaty on the part of the United States, and he having fully and publicly explained the same * * * the St. Regis who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same."

August 9, 1838, "the undersigned chiefs of the Oneida tribe of

New York Indians" gave their free and voluntary assent to the treaty of Buffalo Creek "as amended by the resolution of the Senate of the United States on the eleventh day of June, 1838."

In the following autumn (September 28, 1838) the "chiefs of the Seneca tribe of New York Indians residing in the State of New York" "gave their free and voluntary assent to the foregoing treaty (of Buffalo Creek) as amended by the resolution of the Senate of the United States on the eleventh day of June, 1838, and to our contract therewith." (7 Stat. L., 561.)

Similar consents appear in the statutes (7 Stat. L.) as given by the "sachems, chiefs, and head men of the Tuscarora nation of Indians residing in the State of New York" (*ibid.*, p. 563); by "the chiefs and head men of the tribe of Cayuga Indians residing in the State of New York" (*ibid.*); by the "sachems, chiefs, and head men of the 'American party' of the St. Regis Indians residing in the State of New York," who prefaced their assent with this condition: "The St. Regis Indians shall not be compelled to remove under the treaty or amendments" (dated October 9, 1838, *ibid.*, p. 564), and (August 31, 1838) by the "chiefs, head men, and warriors of the Onondaga tribe of Indians residing on the Seneca reservation in the State of New York."

We thus find specifically mentioned in the treaty or in its appendices the following Indian tribes: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation: Oneidas, St. Reges, St. Regis in New York, the American party of the St. Regis, residing in the State of New York; Stockbridges, Munsees, Brothertowns.

It appears, then, as a fact that the Indians had full notice of the treaty and assented to it, thus supporting the conclusion reached by the President and the Senate, a conclusion which, as we have stated, is conclusive upon us.

It is argued in substance that the payment by authority of Congress of a considerable sum of money to the Tonawanda tribe involves some admission by the defendants of plaintiff's position and is in effect an acknowledgment of a right which would lead to plaintiff's recovery in this cause.

Legislative action is not necessarily a precedent for judicial action, for the legislature has a different quality of responsibility and power from the courts. The Congress may correct injustice in a manner entirely without judicial jurisdiction and this right it often exercises. We, however, are limited in this case to the grant

of jurisdiction given by the special act. Beyond that we can in no event go. If that act fail to give us sufficient power to remedy a wrong (if one has been done) and to remedy it by judicial method, recourse must again be had to the legislature.

The Tonawanda appropriation may have a bearing upon the con-

struction of the jurisdictional act if that act be obscure, but it does not necessarily show that because the Congress believe the Tonawandas deserved indemnity therefore the other tribes did so equally deserve it. Such an inference is, indeed, negatived by the fact that the Congress while compensating the Tonawandas failed to make any payment to the plaintiffs herein and sent them twice to this court (under different grants of jurisdiction) to prosecute their alleged rights—all this long after the Tonawanda appropriation had been made. The differing action of the Congress in the two cases (this case and that of the Tonawandas) shows that body to have been convinced that the Tonawandas were injured and not to have been convinced that these plaintiffs were injured. As to that the Congress preserved an "open mind." In the solution of that question they have invoked judicial aid.

There is a difference in the cases, however, to which as a matter of speculative interest it may be well to refer for it may have had its influence upon the course pursued.

The treaty of 1842 (7 Stat L., 588) between the United States and the Senecas embodies what is therein called an indenture between Thomas Ludlow Ogden and Joseph Fellowes and the chiefs and head men of the Seneca nation of Indians. In the second article of this indenture the Senecas grant to Ogden and Fellowes, in consideration of certain agreements on their part, "the whole of the said two tracts of land severally called the Buffalo Creek reservation and the Tonawanda reservation and all the right and interest therein of the said nation." In the third article it is stipulated that for "the sale and release of the said four tracts of land there shall be paid to the said nation a just consideration sum for the release of the two tracts hereby confirmed to the said Ogden and Fellowes, to be estimated and ascertained as follows." Briefly, the value of the Indian title and improvements was estimated at \$202,000, of which \$100,000 was fixed as the value of the title to the four tracts, excluding improvements, and \$102,000 was fixed as the value of the improvements on them; of this Ogden and Fellowes were to pay to the Senecas "such proportion as the value of all the lands within the said two tracts called the Buffalo Creek and Tonawanda reservations shall bear to the value of all the lands within all the said four tracts," with a similar provision as to the money paid for improvements: the amount of the consideration moneys (article IV) to be determined by arbitrators, one to be named by the Secretary of War and one by Ogden and Fellowes, who were also to award the amount to be paid to each individual Indian "out of the sum which, on the principles above stated, they shall ascertain and award to be the proportionate value of the improvements on the said two tracts called the "Buffalo Creek reservation and the Tonawanda reservation;" provision is made for an umpire. The arbitrators' report is to be made in duplicate, one is to be filed "in the office of the Secretary of the Department of War," the other given to Ogden and Fellowes. In the fifth article it is agreed that possession of the forest or unimproved portion of the land shall be given to Ogden and Fellowes within a certain time after the arbitrators' report had been

filed and of the improved portion within two years thereafter: "Provided always, that the amount to be so ascertained and awarded as the proportionate value of the said improvements shall, on the surrender thereof, be paid to the President of the United States, to be distributed among the owners of the said improvements, according to the determination and award of the said arbitrators, in this behalf: And provided further, that the consideration for the release and conveyance of the said lands shall, at the time of the surrender thereof, be paid or secured to the satisfaction of the said Secretary of the War Department, the income of which is to be paid to the said Seneca Indians annually," and the article concludes with a provision for individual Indians surrendering land and improvements prior to two years. The sixth article relates to Indians desiring to remove from the State of New York "under the provisions of any treaty, made or to be made," and that the interest or income of their share of the said funds, etc., shall be paid to the Indians in their new homes, and there are provisions as to any future sale of the Cattaraugus and Allegany tracts.

Defendants' counsel argues that the Tonawandas refused to allow the appraisal to be made, and this appraisal was a duty which fell upon the Government, not Ogden & Fellowes; this the Supreme Court have decided (*Fellowes v. Blacksmith*, 19 How., 366-372); it then should have been speedily performed to enable the Tonawandas to emigrate west, had they so desired; "hence, the United States could not, as against them, claim their share of the land in the West or of the fund of \$400,000 on account of their non-removal within that period. The Tonawandas had, therefore, a right, even in 1857, under the treaties of 1838 and 1842, to call upon the United States to aid in their removal to the Kansas lands, and to perform its other obligations as to their settlement there, or else to compromise for a reasonable sum. The latter course was adopted, and full satisfaction made for the error of judgment on the part of the United States."

Whether this argument be sufficient or not we need not determine; sufficient is it for us that the Congress paid the Tonawandas and did not pay the other New York Indians, but sent them here under the act of January 28, 1893, wherein is found no admission of any Indian rights. This is the governing clause of that act:

That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the fifteenth of January, eighteen hundred and thirty-eight, against the United States growing out of the alleged unexecuted stipulations of said treaty on the part of the United States.

This, with a waiver of the statute of limitations, is the grant of jurisdiction. No specific mention or exception is made of the Tonawandas, and we can only infer that the Congress found a reason for paying them which does not exist as to the other Indians.

This case has a complicated look at first, for the record is full of petitions and other documents relating to a discussion which began

many years ago; in fact the question is a simple one when extraneous matter is stripped from it.

In the first place it is to be kept clearly in sight, that for the promises contained in the treaty of Buffalo Creek the United
 39 States were to receive from the Indians no consideration in money or New York land, and (except in the slight emigration west above described) have received no consideration whatever from the Indians.

The defendants' motive for the treaty was political. They wished the plaintiffs to move west. The plaintiffs have not moved west and defendants have failed in their purpose. This is the substantial condition today, for the slight and unimportant Hogeboom party may be eliminated from the transaction, as the movement simply shows, first, that some few Indians were willing to go to Kansas and were taken to Kansas by the Government, whence many of them returned; second, that the mass of the Indians wished to remain in New York, or at least evinced no desire to leave it.

The search for facts in this case has been somewhat beclouded by the movements of small parties or by the action of individuals of a race not familiar with governmental methods, which did not have adequate form of political expression, and which was temporarily influenced by the greater sagacity of the white men with whom they dealt. By this we do not mean to intimate that they were improperly influenced or influenced by unfair means. The main and important object of the defendants was to move the Indians west before the advancing wave of Anglo-Saxon civilization, and the endeavor to accomplish this object (believed to be beneficent for all parties) led, first, to the grant of the Wisconsin lands; that experiment having slight success, a second effort was made in 1838 with the Kansas lands, and that substantially failed.

The principal facts are that the Indians did not wish to go west, the Government did not force them to do so, and they are in New York today. Some individuals or bands went to Wisconsin or Kansas, but of them there is no question here, for they received land as promised. The treaty with the Menomonees promised Wisconsin lands in return for emigration; the treaty of Buffalo Creek promised Kansas lands for emigration; but the New York Indians did not emigrate, and of the New York lands the Government of the United States never received from the Indians an acre, and as the Indians did not leave the State the United States has received no substantial benefit from the plaintiffs and no money value whatever.

When it is remembered (and this must be remembered) that the United States did not acquire the New York lands, nor wished to do so; that it never was intended (except through Indian emigration westward) that the United States should ever receive anything by way of consideration for the treaty of Buffalo Creek, much of the difficulty which seemed to surround this case disappears.

The land in New York was disposed of through the States of New York and Massachusetts in negotiation with the Indians; in these transactions the United States was in any way only indirectly interested and not at all financially interested. The Indian lands in

New York did not come into the possession of the United States under the treaty of 1838 or otherwise, and it was never intended that they should do so.

The Buffalo Creek treaty has vanished, leaving no rights or duties behind it in so far as this litigation is concerned. It said in substance to the Indians: If you wish to go west notify us and we will take you and provide for you; or, to take the other argument, it empowered the President to order the Indians west if he deemed it wise to do so.

40 The few Indians who wished to go to Kansas were taken there and given their land, upon which they did not care to remain, and no more Indians tried to follow them. The Indians who wished to go to Wisconsin were there given lands as promised.

The whole transaction, set forth in this opinion and in the findings, was simply an endeavor on the part of the United States to move the Indians out of New York, and this endeavor failed for the one reason that the Indians did not wish to go—and they did not go. Except for the slight emigration to Wisconsin and the still slighter one to Kansas, where, in both instances, the Indians received their lands, there was no desire shown to leave New York.

The treaty failed. It was not rescinded; it was not violated; but it did not accomplish its full purpose. It did not remove the tribes west, but it removed as many of the Indians as wished to go—a very insignificant minority.

Perhaps the President had the power and technical right under the treaty of Buffalo Creek to surround the Indians with troops and force them away from their homes against their will, but it was not a power he must use, and it was not a power which the Indians wished him to use.

It cannot be doubted that if the plaintiffs in this action really wished to avail themselves of the treaty grants the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. But the Government was not prepared to resort to harsh measures, or, against his will, to drive the Indian from his home, so it made a bargain with him in 1838, and that bargain it fulfilled in moving the Hogeboom party, for in doing this it moved all the Indians who then or since (so far as is shown) have ever wished to leave New York for the Kansas lands.

This is not a case in which the Indian has been harshly treated, where his rights have been invaded, or where he has been sacrificed to the Caucasian. On the contrary, he appears to have received the greatest forbearance; in the face of advancing white settlement he has been allowed by the United States to make his own terms with the States and with the land companies or their representatives or assignees, and he has been allowed to remain at home, while provision was made both in Wisconsin and Kansas for his removal westward had he wished to leave New York.

As to the character of the transactions which lead to the sale of the lands in New York we have nothing to do further than to note that the United States Government was not a party to them, except

in one case where it in terms affirmed an arrangement made with Ogden and Fellowes (acting under State authority) by the Indians.

We have no reason to doubt that the United States took to Kansas all the Indians who wished to go there, and thus substantially fulfilled their share of the contract. Some Indians went to Wisconsin, as they had a right to do, and there received land as was promised. The mass of the Indians remained in New York, as they preferred to do and as they had a right to do, and sold their lands or now remain upon them.

The United States took from the Indians no lands in New York; they offered lands in Wisconsin and Kansas, and so far as the Indians wished it they were moved to those lands and took possession of them.

41 The purpose of the United States in negotiating the treaty of Buffalo Creek has substantially failed, but plaintiffs have not been injured by that failure, for the Government (it seems to us) has fulfilled any obligation imposed upon it by the treaties with the New York Indians so far as the Indians permitted. The whole transaction has been for many years closed; there is shown in this record no reason for reopening it.

Upon the whole case it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek, but as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfillment and preferred the then existing situation—no damage to either side can be said to have been inflicted. This conclusion, if it be correct, eliminates the treaty of 1838 from the discussion and brings us to a consideration of the relations and obligations of the parties prior to the conclusion of that agreement.

So far as this action is concerned the rights of the Indians prior to the treaty of 1838 were fixed and defined by the treaty with the Menomonees dated February 8, 1831 (7 Stat. L., 342).

One of the considerations of the treaty was stated in the preamble to be to settle "the long-existing dispute between themselves and the several tribes of the New York Indians, who claim to have purchased a portion of their lands;" and the following provisions upon that subject are found in the instrument:

The Menomonees protest—

That they are under no obligation to recognize any claim of the New York Indians to any portion of their country; that they neither sold, nor received any value, for the land claimed by these tribes; yet at the solicitation of their Great Father, the President of the United States, and as an evidence of their love and veneration for him, they agree that such part of the land described, being within the following boundaries, as he may direct, may be set apart as a home to the several tribes of the New York Indians, who may re-

move to and settle upon the same, within three years from the date of this agreement, viz: (Here is a description of the New York Indian land, as well as of land for a military reservation, etc.) The country hereby ceded to the United States, for the benefit of the New York Indians, contains by estimation about five hundred thousand acres, and includes all their improvements on the west side of the Fox river. As it is intended for a home for the several tribes of the New York Indians who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time, so as not to assign to any tribe a greater number of acres than may be equal to 100 for each soul actually settled upon the lands, and if, at the time of such apportionment, any lands shall remain unoccupied by any tribe of the New York Indians, such portion as would have belonged to said Indians, had it been occupied, shall revert to the United States. That portion, if any, so reverting, to be laid off by the President of the United States. It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall, from time to time, think proper to adopt.

For this cession the United States, "for the benefit of the New York Indians," "consented" to pay to the Menomonees \$20,000, in four installments of \$5,000 each.

42 In the sixth article of the same treaty (with the Menomonees, 1831; 7 Stat. L., 342) the Menomonee chiefs request the President that such part of the treaty as relates to the New York Indians—

be immediately submitted to the representatives of their tribes. And if they refuse to accept the provision made for their benefit, and to remove upon the lands set apart for them on the west side of the Fox river, that he will direct their immediate removal from the Menomonee country; but if they agree to accept of the liberal offer made to them by the parties to this compact, then the Menomonee tribe as dutiful children of their Great Father, the President, will take them by the hand as brothers, and settle down with them in peace and friendship.

An article supplementary to this treaty was agreed to by the United States and the Menomonees, February 17, 1831 (7 Stat. L., 346), the preamble of which states that it has been represented—

That it would be more desirable and satisfactory to some of those interested that one or two immaterial changes be made in the first and sixth articles, so as not to limit the number of acres to 100 for each soul that may be settled upon the land when the President apportions it, as also to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States.

To accomplish these objects the first article provides that such part of the first article of the treaty of February 8, 1831, as limits the removal and settlement of the New York Indians upon the Wisconsin lands shall be altered and amended so as to read as follows :

That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just. And if, within such reasonable time, as the President of the United States shall prescribe for that purpose, the New York Indians shall refuse to accept the provisions for their benefit, or having agreed, shall neglect or refuse to remove from New York, and settle on said lands, within the time prescribed for that purpose, that then, and in either of these events, the lands aforesaid shall be, and remain the property of the United States, according to said first article, excepting so much thereof, as the President shall deem justly due to such of the New York Indians as shall actually have removed to, and settled on the said lands. Second, it is further agreed that the part of the sixth article of the agreement aforesaid, which requires the removal of those of the New York Indians, who may not be settled on the lands at the end of three years, shall be so amended as to leave such removal discretionary with the President of the United States. The Menomonee Indians having full confidence that in making his decision he will take into consideration the welfare and prosperity of their nation. (See also note on p. 347, 7 Stat. L.)

This, then, opened the Menomonee lands to New York Indian settlement during the pleasure of the President, and some of the New York Indians have settled there.

The situation as to the Wisconsin lands does not seem to us to differ in principle from that of the Kansas lands. They were opened to the defendant Indians for a small money consideration paid by the United States to the Menomonees. Some New York Indians went there, took up the lands, and lived there. The others were free to go, but did not wish to do so; in fact, so averse were they to such an emigration that the Government was led to the endeavor to move them to Kansas formulated in the treaty of Buffalo Creek, which attempt also failed, leaving the Indians in the State of New York, where most of them are today. The Indians who went to Wisconsin, equally with the few who went to Kansas, received the land promised them; the others preferred to remain at home and sell their New York lands.

There is no reason to apply in this case with any strictness the general principles governing the relations of guardian and ward, which usually much affect the decision of cases between the Indian tribes and the Government, for the plaintiffs herein have been treated with kindness and consideration, and have in no way been injured or disturbed in their rights and privileges.

Petition dismissed.

43

V.—*Judgment of the Court.*

THE NEW YORK INDIANS	}	17861.
<i>v.</i>		
THE UNITED STATES.		

At a Court of Claims held in the city of Washington on the sixth day of January, A. D. 1896, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimants, the said New York Indians, be dismissed.

BY THE COURT.

44 VI.—*Application of Claimants for and Allowance of Appeal.*

THE NEW YORK INDIANS	}	17861.
<i>v.</i>		
THE UNITED STATES.		

From the judgment rendered in the above-entitled cause on the 6th day of January, A. D. 1896, in favor of the defendants, the claimants, by Guion Miller, their attorney of record, on the 15th day of January, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

GUION MILLER,
Att'y of Record for Claimants.

Filed and allowed in open court on the 15th day of January, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

45

In the Court of Claims.

THE NEW YORK INDIANS	}	17861.
<i>v.</i>		
THE UNITED STATES.		

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 22d day of January, A. D. 1896.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,154. Court of Claims. Term No., 864. The New York Indians, appellants, *vs.* The United States. Filed January 22d, 1896.

OUND CLOSE IN CENTER

N. H. S. 106.

Ex. of Davis, Miller,

OCT 15 1896
Barker & Co.
JAMES H. MCKENNEY,
CLERK.

Gowan for Opps.

Filed Oct. 15, 1896.
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

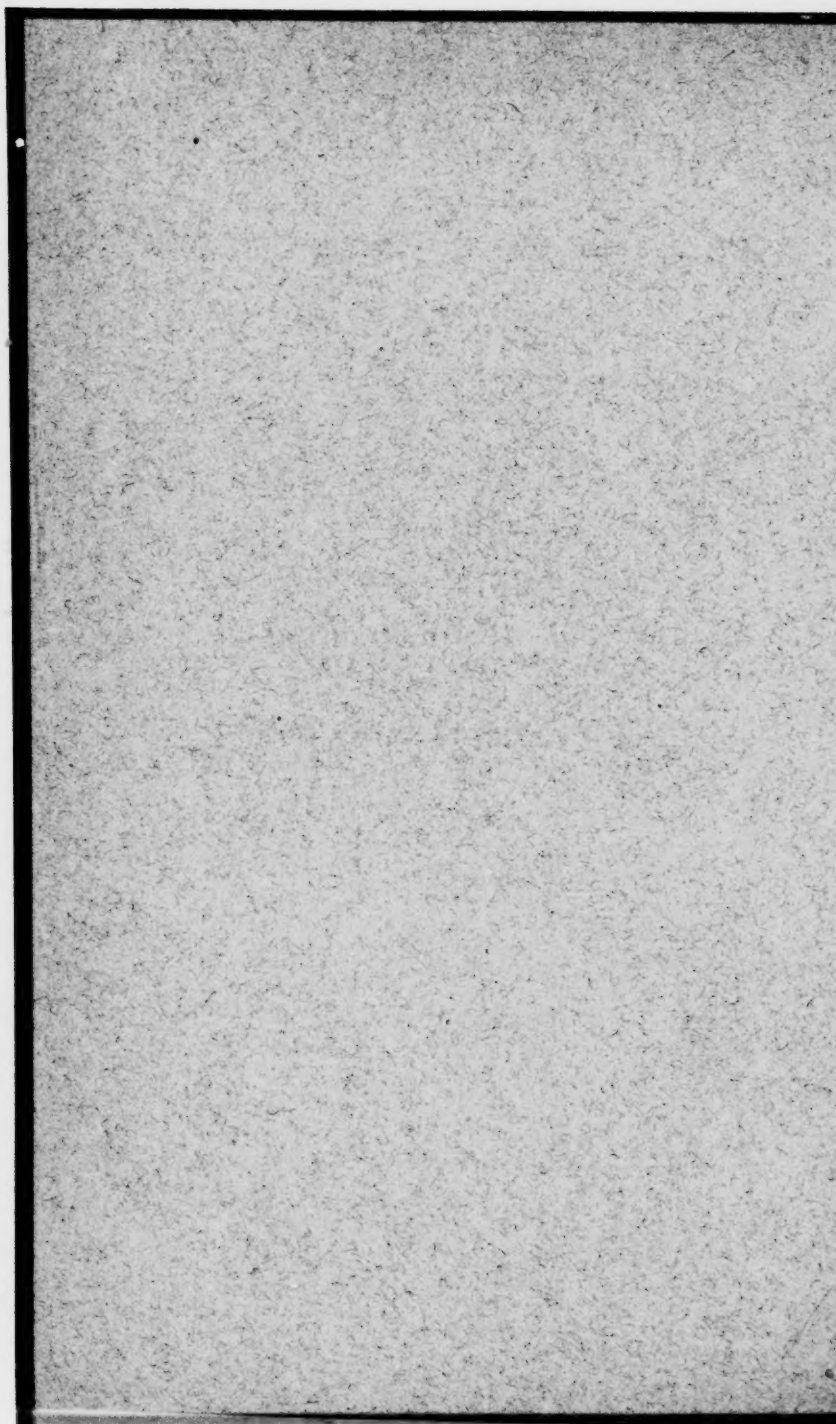
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

HENRY E. DAVIS, ✓
GUION MILLER, ✓
For the Appellants.

GEORGE BARKER, ✓
JAMES B. JENKINS,
JONAS H. MCGOWAN, ✓
Of Counsel.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

I.

STATEMENT OF THE CASE.

On January 15, 1838, the United States made with the New York Indians the treaty known as the treaty of Buffalo Creek. (7 Stats., 550.)

The Indians claim that the United States violated this treaty, and on January 21, 1884, the claims of the Indians in the premises were referred under the "Bowman act," so called (act of March 3, 1883), to the Court of Claims. That court reported its findings to the Senate January 16, 1892, and thereupon, on January 28, 1893, Congress passed the act under which the claims are now to be considered, namely,

"An act to authorize the Court of Claims to hear and determine the claims of certain New York Indians against the United States." (Rec., 4, 5.)

This act conferred upon the Court of Claims jurisdiction "to hear and enter up judgment, as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th day of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States."

The material facts, as found by the Court of Claims, are as follows (Rec., 7 to 24):

The Indians described in the jurisdictional act are the Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay, Wisconsin, and on the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American Party of the St. Regis residing in the State of New York, Stockbridges, Munsees, and Brothertowns. These Indians are, in legal effect, the well-known Six Nations.

Certain of the New York Indians between the years 1810 and 1816 petitioned for permission to purchase reservations of their Western brethren and to remove to and occupy the same, and, consent being given, the United States aided some of the Indians representing the claimants in exploring certain parts of Wisconsin with a view to the immigration thither of such of the Six Nations as might choose to go; and on August 18, 1821, the Menomonee and Winnebago nations of Indians, for a valuable consideration, ceded to the Six Nations and the St. Regis, Stockbridge, and Munsee tribes certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres. The President of the United States approved this cession.

Permission to secure an extension of this cession was duly given, and thereafter, on September 23, 1822, the Menomonees, for a valuable consideration, made a similar cession of another tract of land, containing at least five million acres, to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee Indians; the grantees promising that the grantors should have free permission and privilege of occupying and residing upon the lands in common with the former. This latter cession was duly approved, on the understanding, however, that the lands were to be held by the grantees in the same manner as they were held by the grantors previous to the grant, and that the title of the grantees should not interfere in any way with the lands previously occupied by the Government of the United States or its citizens. On October 27, 1823, the Secretary of War officially notified the grantees that the President wished them to understand that by this partial sanction he did not mean to interfere with or in any manner invalidate their title to all the lands acquired, but that, on the contrary, he considered their title to every part of the lands conveyed to them by the grantors as equally valid as against them, and that what they had done was with the full sanction of the Government. The grants above mentioned include the lands subsequently ceded by the Menomonees to the United States by the treaties of August 11, 1827, and February 8, 1831.

Thereafter some of the New York Indians removed to and took possession of the lands in Wisconsin. Later, and after 1832, another small portion of the New York Indians removed to those lands. March 14, 1840, the Senecas denied ownership of the Wisconsin lands, stating that they determined to have no other home than that of their fathers, where they then resided, and in May and September following, in petitions to the President and Senate and House of Representatives, the council of the Senecas denied that they were parties to the treaty of 1838. It does not appear that application was made by the tribes or bands or any of them

for removal to the Kansas lands provided for in the Buffalo Creek treaty except as hereinafter appears, and it does not appear that any substantial number of Indians, other than those who made up the Hogeboom party hereinafter mentioned, desired to go to Kansas.

In the year 1838, at the time of the negotiation of the treaty of Buffalo Creek, the Senecas, Onondagas, Oneidas, Cayugas, Tuscaroras, and St. Regis tribe each possessed a certain reservation in the State of New York on which numbers of those tribes resided and the right of occupancy of which was secured to them by treaty stipulations. The Cayugas had no separate reservation of their own in New York, but made their home with and resided upon the reservations possessed by the Senecas. This they did with the consent of the Senecas, and a portion of the Onondagas did the same. The lands occupied by the Senecas in New York consisted of four separate and distinct reservations containing in all one hundred and fourteen thousand eight hundred and sixty-nine acres, and the lands occupied by the Tuscaroras, Onondagas, Oneidas, and St. Regis Indians aggregated in amount twenty-seven thousand nine hundred and forty-nine acres, making the total of lands occupied by the New York Indians in New York one hundred and forty-two thousand eight hundred and eighteen acres. For many years prior to the treaty of Buffalo Creek the Indians residing in New York had improved and cultivated their lands, on which they resided, and from the products of which they chiefly sustained themselves. (The treaty of Buffalo Creek, as printed in 7 Stats., contains a misprint on the third line of page 556. The word "Oneidas" is in the original treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation.")

While the treaty of Buffalo Creek was under consideration by the Senate various amendments thereto were made by that body, which, in the end, by a two-thirds vote, adopted the following resolution :

"That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty of June 11, 1838, with the New York Indians according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommend that the President make proclamation of the said treaty and carry the same into effect."

Thereafter and on April 4, 1840, the President proclaimed the treaty as found in 7 Stats. (with the correction above indicated), reciting, in his proclamation, a resolution of the Senate of March 25, 1840, "that, in the opinion of the Senate, the treaty between the United States and the Six Nations of New York Indians, with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by all said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation;" and the proclamation in terms used the following language:

"Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the 11th of June, one thousand eight hundred and thirty-eight, and the 25th day of March, one thousand eight hundred and forty, accept, ratify, and confirm said treaty and every article and clause thereof."

For convenience at this point the essential terms of the treaty, as summarized in the petition (Rec., 1, 2), are given as follows:

On the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, there was concluded between the claimants and the United States a treaty known as the treaty of Buffalo Creek, wherein and whereby it was provided, in consideration of the premises therein recited and of the covenants contained in the treaty itself to be per-

formed by the United States, that the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States in and by said treaty agreed and guaranteed as follows:

First. To set aside as a permanent home for all of the claimants a certain tract of country west of the Mississippi river, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations, or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in the certain schedule annexed to the said treaty, and designated as Schedule A, on condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest to the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal West, the following sums, respectively, namely, to the St. Regis tribe, five thousand dollars (\$5,000); to the Seneca nation, the income annually of one hundred thousand dollars (\$100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorize to be paid to the United States); to the Cayugas, twenty-five hundred dollars (\$2,500) in cash, and the

annual income of twenty-five hundred dollars (\$2,500) ; to the Onondagas, two thousand dollars (\$2,000) in cash, and the annual income of twenty-five hundred dollars (\$2,500) ; to the Oneidas, six thousand dollars (\$6,000) in cash, and to the Tuscaroras, three thousand (\$3,000) dollars.

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars (\$400,000), to be applied from time to time by the President of the United States for the following purposes, namely : To aid the claimants in removing to their new homes and supporting themselves the first year after their removal ; to encourage and assist them in being taught to cultivate their lands ; to aid them in erecting mills and other necessary houses ; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country, if they so desired, but were exempted from obligation so to do.

The President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to the subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs), that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was

ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the following allegations: (a) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the pre-emption owners; (b) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified the lands and improvements on the Buffalo Creek reservation in New York were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Allegany reservations, in New York.

Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the Department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes, as contemplated by the treaty of Buffalo Creek and as shown below. Of this number, only thirty-two ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in con-

formity with such desire said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of \$9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians, under Hogeboom's direction, in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number seventy-three did not leave New York with the party; 191 only arrived in Kansas June 15, 1846; seventeen other Indians arrived subsequently; eighty-two died and ninety-four returned to New York.

It does not appear that any of the thirty-two Indians to whom allotments were made settled permanently in Kansas.

A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, to be held at Cattaraugus June 2, 1846, to learn the final wishes of the Indians as to emigration. The Commissioner, who was sent on the part of the United States, reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The Commissioner also reported that he held an enrollment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as willing to go.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wisconsin, contained 65,540 acres in number, all of which has been allotted in

severalty and reserved for school purposes, except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty (9 Stat. L., 955; 11 Stat. L., 663, 679; 16 Stat. L., 404). The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract of land at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as in the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor, and the said lands were thereafter and now are included within the territorial limits of the State of Kansas.

The price realized by the United States for such of said lands as were sold was at the rate of \$1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about \$1.22 per acre.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of the release by that band of its claims under the treaties of 1838 and 1842, namely, its claims "to the lands west of the State of Missouri, and all right and claim *to be removed* thither, and for support and assistance after such removal, and all other claims against the United States under the aforesaid treaties of 1838 and 1842," (11 Stats., 736), agreed to pay and invest, and did pay and invest, for said band the sum of \$256,000.

This sum of \$256,000 was equivalent to one dollar per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of \$400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory, known as the New York Indian reserve, be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and allotments were made to them. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860), some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting in the powers of attorney that the United States had seized upon the said lands, contrary to the obligations of said treaty,

and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

Of the sum of \$400,000 agreed by the treaty of Buffalo Creek to be appropriated for the purposes mentioned therein the sum of \$20,477.50 was appropriated, and of this \$9,797.11 were expended, this expenditure being for the removal and subsequent care of the Indians who emigrated in 1846. Of this amount \$1,034.50 were for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling; \$5,800.29 for pay of agent for transportation and supplies on the way, and \$2,962.32 for supplies, etc. (including \$350 for medical attendance and supplies), after arrival.

The following payments were also made under the treaty :

Under article 9, \$5,000 to the St. Regis tribe.

Under article 11 and Schedule C, \$1,500 to William King, he having emigrated in 1846.

Under article 13, \$6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.

Under article 14 and Schedule B, \$125 to James Cusic, he having emigrated in 1846.

The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows, contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to non-emigration, the Indians have received the money in New York.

It does not appear that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of any New York Indians from Wisconsin and New York to the Kansas lands other than the Hogeboom party, as hereinbefore set forth.

There is evidence tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

The following facts, agreed upon by both parties, are at their request found by the court :

It is hereby stipulated and agreed between the counsel representing the parties to this case that the Court find the following statement of facts, all of which are matters of history :

First. Prior to 1786 the title to and sovereignty over the lands then occupied by the New York Indians, except as to their right of possession under their Indian title, was claimed by the States of New York and Massachusetts respectively, and on December 16, 1786, Massachusetts ceded to New York the "government, sovereignty, and jurisdiction" over the disputed territory, while "the right of pre-emption of the soil from the native Indians" was divided territorially between the two States, New York acquiring an absolute right of pre-emption in a territory which included what afterwards became known as the Oneida, Onondaga, and St. Regis reservations, and Massachusetts acquiring a similarly absolute right in the territory which included what were afterwards known as the four Seneca reservations and the Tuscarora reservation.

The agreement by which the said concessions were made by the said parties is contained in an instrument in writing made and executed by and between the said States, at the city of Hartford, in the State of Connecticut, on the 16th day of December, in the year of our Lord 1786, a copy of which agreement is recorded in the office of the county clerk of the county of Cattaraugus, State of New York, in Liber One, at pages 270-280, to which record reference is here made, and either party is at liberty to read the whole or any part thereof on the hearing of this case. The Indian title and right of possession to a part of the said territory was after-

wards bought and extinguished by certain grantees of Massachusetts in the year 1789.

The pre-emption right and estate of Massachusetts in the remaining part of these lands was granted by the said State to Robert Morris, May 11, 1791, and by him to the trustees of the Holland Land Company in the year 1793, except as to the land known as the "Morris reserve," and from time to time the Indian title as to the various tracts was extinguished by these parties. But this relinquishment of the Indian title did not include the lands and reservations occupied by the Seneca and Tuscarora Indians mentioned and referred to in the treaty of 1838.

The Tuscaroras came from North Carolina prior to the Revolutionary war and formally united themselves with the confederacy of the New York Indians, known at that time as the Iroquois confederacy, and were assigned to and resided upon the territory of the Oneidas, and thereafter the Iroquois confederacy became known as the Six Nations; and prior to 1788 the Tuscaroras commenced a settlement by themselves on lands which they now occupy, located in the county of Niagara, and obtained an Indian title to 1,920 acres of land from the Seneca nation of Indians and the Holland Land Company.

In 1804 the Tuscaroras purchased with their own moneys 4,329 acres of land lying adjacent to the tract of land last mentioned, and they now own and occupy the last-mentioned tract in fee-simple; and the said two parcels of land comprise 6,249 acres of land mentioned and referred to in the eleventh finding of fact in Congressional case No. 151 as being occupied by the Tuscarora Indians.

In 1810 the Holland Land Company conveyed to David A. Ogden its estate and property in the Buffalo Creek, Cattaraugus, Allegany, Tonawanda, Tuscarora, and Canadea reservation—in all, 196,335 acres—subject only to the right of the native Indians to occupy and possess the same under their Indian title.

On August 1, 1826, the Seneca nation sold to Thomas Ludlow Ogden and others, trustees of the Ogden Land Company, the Caneadea, Canawaugus, Squawky Hill, and Big Tree reservations and parts of the Buffalo Creek, Cattaraugus, and Tonawanda reservations and surrendered possession of the same; but this sale and surrender of lands did not include any of the lands and reservations mentioned and described in the treaty of 1838, and also in the eleventh finding of fact in Congressional case No. 151.

Second. The provisions of the treaty of Buffalo Creek of 1838, whereby the Tuscaroras sold to Ogden and Fellows a part (including the 1,920 acres) of their reservation and conveyed the balance to the United States in trust for sale on their account, were never followed by any surrender of possession by the Tuscaroras, or payment of the purchase-money by Ogden and Fellows, or any sale of any part of the reservation by the United States, and the Tuscaroras have continued to hold and occupy their entire reservation, as before described, ever since. The terms and conditions of the sale to Ogden and Fellows and the object and purpose of the same are set forth in article 14 of the treaty of 1838, and the form of the deed made and executed by the Tuscaroras is attached to the said treaty of 1838 and published therewith, to which reference is here made, and said article 14 and copy of the deeds thereto attached may be read by either party on the hearing.

Third. The Tonawanda band of the Senecas did not on the execution of the treaties of 1838 and 1842 surrender up the possession of their reservation to Ogden and Fellows under the provisions of the treaties of 1838 and 1842, and when the said Fellows and others proceeded to dispossess one of this band of a part of the reservation an action of trespass *quare clausum fregit* was brought by the Indian sought to be dispossessed and a judgment rendered in favor of the plaintiff therein in the supreme court of the State of New York, which judgment was affirmed by the court of appeals

of the State of New York, and on appeal to the Supreme Court of the United States the judgment of the court of appeals of the State of New York was affirmed, and the facts and circumstances of the case are stated and set forth in the case entitled Joseph Fellows, survivor of Robert Kendle, plaintiff in error, against Susan Blacksmith and Eli S. Parker, administrators of John Blacksmith, deceased.

This case is reported in the 19th of Howard, page 366; to which case, so reported, reference is made for the facts and circumstances of the case upon which the said several judgments were based.

Fourth. The Oneidas of New York sold and conveyed to the State of New York a further portion of their lands within the State, retaining 350 acres, upon which a portion of the Oneidas now reside, and in 1848 and prior thereto a large number of the said tribe removed to the State of Wisconsin and settled upon that portion of the Green Bay lands which have been occupied by others of the tribe prior to 1838 and which was excepted from the operation of article 1 of the treaty of 1838.

The opinion of the Court of Claims is printed in the record on pages 24 to 44. Conformably to its opinion, the Court of Claims dismissed the petition and the claimants duly appealed. (Rec., 45.)

II.

ASSIGNMENT OF ERROR.

The Court of Claims erred in dismissing the petition of the claimants.

III.

ARGUMENT.

1. The act under which the case was heard by the Court of Claims is set forth in full in the twelfth paragraph of the petition printed on pages 4 and 5 of the record.

The leading facts of the case are seen to be that at the time of the treaty of Buffalo Creek the New York Indians had an Indian title to 500,000 acres of land in the State of Wisconsin, on which a part of them at that time resided; that by the treaty of Buffalo Creek the New York Indians released their title to the Wisconsin lands and surrendered possession of the same to the United States, the latter granting to the Indians a reservation in the then Indian Territory, described by metes and bounds and containing 1,824,000 acres of land, and agreed that these lands should never be included in any State or Territory of the Union, and that the Government would appropriate the sum of \$400,000 to be applied from time to time by the President to aid the claimants in removing to their new homes and supporting themselves the first year after removal, to encourage and assist them in being taught to cultivate their lands, to aid them in erecting mills and other necessary houses, and to aid them in purchasing domestic animals and farming utensils and acquiring a knowledge of the mechanic arts; that the President never prescribed any time for the Indians to remove, and that but few of them did remove, and those few so removed under the superintendence of an agent appointed by the Government; that of the sum of \$400,000 above mentioned the United States never appropriated more than \$20,477.50, and of this sum only \$9,464.08 was actually expended; that the lands in the Indian Territory secured to the claimants by the treaty of Buffalo Creek were actually set apart by the United States and designated upon the land maps thereof as the New York Indian reserva-

tion and so remained until the year 1860, when the Government surveyed the lands and made them a part of the public domain, and afterwards sold and disposed of them, receiving the entire consideration therefor; that the said lands thereafter were and now are included within the territorial limits of the State of Kansas; that the action of the Government in appropriating the lands was in pursuance of proclamations of the President of December 3 and 17, 1860, and grew out of an order of the Secretary of the Interior of March 21, 1859, and between the last-mentioned date and the proclamation of the lands as a part of the public domain the claimants employed counsel to protect and prosecute their claims in the premises, asserting that the United States had seized the lands contrary to the obligation of the treaty and would not permit the claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted their claims in the premises; that more than five years after the proclamation of the treaty, namely, on November 5, 1857, the United States, by treaty with the Tonawanda band of Senecas, numbering 650 individuals, in consideration of the release by that band of its claims upon the United States to the lands in the Indian Territory and of all right and claim to be removed thither, and for support and assistance after removal, and all other claims against the United States under the treaty of Buffalo Creek, agreed to pay and invest, and did pay and invest, for said band the sum of \$256,000, which payment and investment amounted in substance to compensating the members of the band at the rate of one dollar per acre for their claims to the Kansas lands under the treaty, and also their proportionate share of the sum of \$400,000 aforesaid according to the schedule in the treaty, and that a portion of the fund thus paid and invested was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation, in New York, for the benefit of that band, and the Tonawandas still reside thereon; and that there was evidence

before the Court of Claims tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

2. The ground upon which the Court of Claims dismissed the petition is expressed in the following paragraph of the opinion (Rec., 42):

"Upon the whole case, it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek; but, as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfilment and preferred the then existing situation—no damage to either side can be said to have been inflicted. This conclusion, if it be correct, eliminates the treaty of 1838 from the discussion and brings us to a consideration of the relations and obligations of the parties prior to the conclusion of that agreement."

And again in the following language (Rec., 41):

"The Buffalo Creek treaty has vanished, leaving no rights or duties behind it, in so far as this litigation is concerned."

It is to be observed that the Court does not rest its decision in terms upon a forfeiture by the claimants of their rights under the treaty. On the contrary, the Court in its opinion (Rec., 35) distinctly finds that there was no forfeiture; and if the United States were disposed to assert a forfeiture it is confidently submitted that under the act conferring jurisdiction upon the Court of Claims and the pleadings, consisting of the petition and a general traverse, no such question could arise. Indeed, the Court by its opinion clearly shows that it did not consider such question to be involved in the

case, but fell back upon an assumed vanishing or elimination or abandonment of the treaty.

In this connection, it is appropriate to consider the forfeiture clause of the treaty. The entire argument for the United States in the court below rested upon counsel's interpretation of article 3 of the treaty of Buffalo Creek, which provides that—

"It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes *within five years, or such other time as the President may from time to time appoint*, shall forfeit all interest in the lands so set apart to the United States."

The contention was that this limits the right of the Indians to remove to the Kansas lands to five years "*unless the President shall have extended the time by affirmative action.*"

The claimant's contention is, on the other hand, that under article 3 there could have been no forfeiture within the specified *minimum period of five years*, and if the Indians had not removed at the end of this period their rights would continue "*until the President fixed a time, by affirmative action, beyond which their right to remove should not extend, and that they could only forfeit these lands after positive notification by the President that their refusal to remove by a specified date would work such forfeiture* ; and it may be added that even this notification must have been supported by a showing that the United States had performed every duty prescribed by the treaty and had made all necessary provisions for such removal.

That this is the correct interpretation of article 3, we submit, is clearly established by the well-known rule of construction that where words are used in one place with a definitely fixed meaning and similar words subsequently

appear in provisions *in pari materia* they are to receive the same interpretation.

Reiche vs. Smythe, 13 Wall., 162.

In the recital, beginning in line 23 of the preamble to this treaty of Buffalo Creek (7 Stat., 550), we find an expression similar to that under discussion used in speaking of the treaty between the Menomonees and the United States of February 8, 1831 (7 Stat., 342), as amended on February 17, 1831 (7 Stat., 346), and assented to by the New York Indians October 27, 1832 (7 Stat., 409), the language being as follows:

"And whereas by the provisions of that treaty five hundred thousand acres of land are secured to the New York Indians of the Six Nations and St. Regis tribe as a future home on condition that they all remove to the same *within three years or such reasonable time as the President should prescribe.*"

The expression "*within five years or such reasonable time as the President may from time to time appoint,*" found in article 3, is certainly used as the equivalent of the expression "*within three years or such reasonable time as the President should prescribe*" found in the preamble, with only the change from three to five. But this expression, as used in the preamble, is given a fixed and definite meaning by a reference to the treaty of February 8, 1831, as amended on February 17, 1831. This treaty as originally drafted limited the time of removal absolutely to three years from its date. (See language used near the end of first article, on page 343 of 7 Statutes.) This, however, was changed by the first amendment adopted on February 17, 1831 (see page 347 of 7 Statutes), whereby it is provided that the President shall prescribe the time for the removal, and that if the Indians shall refuse to remove *within such reasonable time as the President shall prescribe* for that purpose the lands are

to go to the United States, and it was as thus amended that the New York Indians gave their assent to it. (7 Statutes, 409.)

An examination of the treaty referred to thus demonstrates that the expression "*within three years or such reasonable time as the President should prescribe,*" used in the preamble, had the fixed and fully defined meaning that "*until*" the President fixed a time by affirmative action the rights of the Indians continued. When thus we find language so similar used in article 3 of the treaty, surely "it was intended it should receive the same interpretation" (13 Wall., 162-'5). Certainly that was "how the words of the treaty were understood by this unlettered people," and this "should form the rule of construction."

Choctaw Nation vs. United States, 119 U. S., pp. 27 and 28.

This view of the meaning of article 3 destroys the force of the argument for the United States deduced from the Senate resolutions; for even those resolutions might be read into the treaty (which on familiar principles is impossible), and still *the right of the President* to "retain a proper proportion of said sum of \$400,000" and to "deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave each emigrant 320 acres" (Rec., 16, 17) *would only arise when the Indians had lost their right to remove.*

3. The assumed vanishing, elimination, or abandonment of the treaty will not stand examination.

Although in its opinion (Rec., 44) the Court of Claims says there "is no reason to apply in this case with any strictness the general principles governing the relations of guardian and ward, which usually much affect the decision of cases between the Indian tribes and the Government," it is earnestly submitted that these principles are of the first importance in considering the case. Abandonment can be

predicated only of the conduct of a party *sui juris*, and it is the uniform holding of every department of the Government that the Indian tribes are not and never were *sui juris*, except to the limited extent of having power to make the sort of treaty which until the act of Congress of March 3, 1871 (R. S., 2079), was the unbroken principle of the Government in dealing with the Indians. It is and always has been held by every department of the Government that the Indian tribes are the wards of the nation, and it is a misuse of language and an abuse of legal principle to say that a guardian can claim abandonment of any right by his ward, especially so long as the relation of guardian and ward exists. The language of this Court in the case of the Choctaw nation is peculiarly appropriate here:

"These Indian tribes are the wards of the nation; they are communities dependent on the United States—dependent largely for their daily bread, dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From the very weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised there arises the duty of protection and with it the power. This has always been recognized by the Executive, by Congress, and by this Court whenever the question has arisen. . . .

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as

their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

Moreover, no importance whatever is to be attached to the protests and objections of certain of the Indians to the ratification and carrying out of the treaty of Buffalo Creek. It is the plain fact that after the fullest consideration and in due form of law the United States, through its treaty-making power, assented to and proclaimed the treaty and it thereupon became the law of the land. No more attention can properly be paid to the alleged behavior of the Indians in the premises than could be paid to the preliminary negotiations to a fully formulated and executed contract between individuals. It matters not that some of the Indians protested against the ratification of the treaty, and it is most significant that the Senate recognized the opposition of the Seneca tribe and specifically withheld ratification of the treaty until it was able to say by solemn resolution that the treaty had been assented to by all the Indians. The Senate's resolution was (Rec., 17), "That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of Indians has been given" to the treaty the President was recommended to "make proclamation of said treaty and carry the same into effect;" and in his proclamation, already referred to (Rec., 18), the President quotes the further resolution of the Senate that in its opinion the treaty and its amendments "have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included."

This puts the case thus: The treaty was negotiated; it was objected to in certain particulars by certain of the In-

dians ; the Senate considered the treaty and these objections and amended the treaty ; the Senate withheld ratification of the treaty until all its provisions, including the amendments, should be ratified and approved by all of the Indians ; the Senate solemnly declared that the treaty had been so assented to by all the Indians, the Seneca tribe included ; and the President thereafter proclaimed the treaty thus assented to and solemnly ratified it as the law of the land. It would seem that any further argument on this point would involve worse than a waste of time.

4. The treaty being thus clearly established as the law of the land and the measure of the reciprocal rights and duties of the claimants and the Government in the premises, it remains to consider whether the claimants are entitled to the rights they assert.

The treaty of Buffalo Creek (with its supplement of 1842, which, however, does not affect the claim under consideration) and the mutual duties of the United States and the Indians thereunder have been twice considered by this Court, and this Court has spoken on the subject with no uncertain sound :

“ Neither treaty made any provision as to the mode or manner in which the removal of the Indians . . . was to take place. . . .

“ The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West under the treaties made with them by the United States have been, according to the usage and practice of the Government, by its authority and under its care and superintendence.

“ The negotiations with them as a *quasi* nation possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the treaty was to be carried into execution by the authority or powers of the Government, which was a party to it, and more especially when made with a tribe of Indians who are in a state of pupillage and hold the relation to the Government as a ward to his guardian. . . .

"The treaty of 1838 contemplated a removal to the tract west of the State of Missouri and putting the Indians in possession of it. A large fund was appropriated and in the hands of the Government, to be disbursed in aid of such removal and of their support and encouragement after their arrival. It did not, therefore, separate those Indians from the care and protection of the Government on its ratification, but contemplated further duties towards them, and for which means were supplied. . . .

"We hold that the performance [of the conditions of the treaty] was not a duty that belonged to the grantees, but to the Government under the treaty.

"*Fellows vs. Blacksmith*, 19 Howard, 366."

On the second occasion when the treaty was under consideration by the Court its language was:

"This Court have decided in the case of *Fellows vs. Blacksmith*, 19th Howard, 366, that this treaty has made no provision as to the mode or manner in which the removal of the Indians . . . was to take place; that it can be carried into execution only by the authority or power of the Government, which was a party to it. The Indians are to be removed to their new homes by their guardian, the United States."

New York vs. Dibble, 21 Howard, 371.

These decisions of this Court would seem to be to put it beyond the question that, the duty of the Government not having been performed, the case is wholly without any feature in respect of which loss of their rights by the claimants can be asserted. It being the duty of the Government to do a given thing until the doing of which no such obligation on the part of the claimants as is assumed could be asserted, and the Government not having done that thing, the relations between the claimants and the Government have never reached the point at which any dereliction on the part of the claimants could be charged. This also seems too plain for further notice.

5. In addition, the Government by the Tonawanda treaty, made seventeen years after the proclamation of the treaty of Buffalo Creek, clearly recognized its obligations under the latter treaty.

Referring to the Tonawanda treaty, the Court of Claims in its opinion says:

"It is argued in substance that the payment by authority of Congress of a considerable sum of money to the Tonawanda tribe involves some admission by the defendants of plaintiffs' position and is, in effect, an acknowledgment of a right which would lead to plaintiffs' recovery in this cause.

"Legislative action is not necessarily a precedent for judicial action, for the legislature has a different quality of responsibility and power from the courts. The Congress may correct injustice in a manner entirely without judicial jurisdiction, and this right it often exercises. We, however, are limited in this case to the grant of jurisdiction given by the special act. Beyond that we can in no event go. If that act fail to give us sufficient power to remedy a wrong (if one has been done) and to remedy it by judicial method, recourse must again be had to the legislature.

"The Tonawanda appropriation may have a bearing upon the construction of the jurisdictional act if that act be obscure, but it does not necessarily show that because the Congress believes the Tonawandas deserve indemnity therefore the other tribes did so equally deserve it. Such an inference is, indeed, negatived by the fact that the Congress, while compensating the Tonawandas, failed to make any payment to the plaintiffs herein and sent them twice to this Court (under different grants of jurisdiction) to prosecute their alleged rights—all this long after the Tonawanda appropriation had been made. The different action of the Congress in the two cases (this case and that of the Tonawandas) shows that body to have been convinced that the Tonawandas were injured and not to have been convinced that these plaintiffs were injured. As to that the Congress preserved an 'open mind.' In the solution of that question they have invoked judicial aid."

It is earnestly insisted that the Court misconceived the meaning and effect of the Tonawanda treaty and has given

to the action of Government in that respect a bearing wholly inconsistent with the purposes and manner of the Government in dealing with the matter. It is no argument to say that because the Government recognized and discharged its obligations to part of the Indians therefore it meant to say or to imply that the Indians thus dealt with were the only Indians recognized by Congress as entitled to rights in the premises. It is notorious that the Government is not in the habit of discharging all its duties in a given matter at one and the same time. Because out of a given number of claimants the Government selects a few and meets their claims it does not follow that the claims of the remainder are discarded. In fact, the action of Congress and the President in referring to the Court of Claims the claims asserted by the present claimants is an indication that Congress recognized force in the claims and referred them to that Court for adjudication. The position taken by the Court in its opinion is in effect this: that Congress by its successive action in the premises has stated at one time that the claimants have no rights, and at another, "We will refer to the Court of Claims for adjudication the very rights which we deny."

It is the plain truth that the Tonawandas had no claim upon the Government such as was discharged by the Tonawanda treaty, except such as grew out of the treaty of Buffalo Creek, and that the rights of the Tonawandas to consideration at the hands of the Government were greatly less than those of the present claimants. As stated by the Court of Claims itself (Rec., 32), when the case of *Fellows vs. Blacksmith* was before this Court, an objection was taken on the argument to the validity of the treaty of Buffalo Creek, on the ground that the Tonawanda band was not represented in the negotiation and execution of that treaty; but this Court held that the treaty, having been executed and ratified by the proper authorities of the Government, had become the supreme law of the land, and the courts could no more

go behind it for the purpose of annulling its effect and operation than they could go behind an act of Congress.

Fellows vs. Blacksmith, 19 Howard, p. 372.

It is to be observed that the decision in the case of *Fellows vs. Blacksmith* was rendered by this Court in 1856, and that the Tonawanda treaty was made in November of the next year; conclusive evidence, it would seem, that Congress acquiesced in the view of this Court, and began making amends for the dereliction of the Government by compensating the Tonawandas. Why Congress went no further is manifestly to be attributed to the conditions existing in the country at the time. The country was in the beginning of the troubles which led to the familiar condition of things in Kansas just prior to the outbreak of the civil war, and it is within the bounds of propriety to say that the seizure by the Government of the Kansas lands of the claimants was a part of the now familiar scheme to utilize land in that section in furtherance of well-known political plans. The act of the Secretary of the Interior in 1859 in seizing the Kansas lands has a meaning so clear in the light of our history that "he who runs may read;" and, of course, in the face of the action of the Executive Department of the Government and the claims of the New York Indians growing therefrom, Congress stayed its hand, and ensuing occurrences put out of the question indefinitely any consideration of the rights of the other Indians than the Tonawandas in the premises.

But the Tonawanda treaty is not the only evidence that Congress recognized the rights of the claimants as subsisting. Those rights are recognized in the sundry civil bill of March 3, 1859. Section 11 of that act (11 Stats., 430, 431) authorizes the issuing of patents for land by the Secretary of the Interior to certain Indians in Kansas; but expressly adds:

"*Provided*, That nothing herein contained shall be construed to apply to the New York Indians or to affect their

rights under the treaty made by them in 1838 at Buffalo Creek."

And again in the Kansas-Nebraska act, by which the Territory of Kansas was erected (10 Stats., p. 284), Congress, on May 30, 1854, defined the limits of the new Territory, and after giving the boundary lines, which include the New York Indian lands, Congress said :

"Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory, which by treaty with any Indian tribe, is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory ; but all such Territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribes shall signify their assent to the President of the United States to be included within the said Territory of Kansas."

The thirty-seventh section of the same act (p. 290) provides—

"That all treaties, laws, and other engagements made by the Government of the United States with the Indian tribes inhabiting the Territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

May 4, 1858 (11 Stats., 259), Congress passed an enabling act for the admission of Kansas into the Union as a State, putting it to the vote of the people whether they should come into the Union.

May 3, 1859 (11 Stats., 430, 431), Congress expressly declared—

"That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to separate selections of land and to a patent therefor under guards, re-

strictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians and their heirs, upon such conditions and limitations and under such guards or restrictions as may be prescribed by said Secretary: *Provided*, That nothing herein contained shall be construed to apply to the New York Indians or to affect their rights under the treaty made by them in 1838 at Buffalo Creek."

This, it will be observed, was eighteen days before Secretary Thompson threw the New York Indians' Kansas lands into the public domain, a year and six months after the treaty with the Tonawandas, and three years after this Court had in effect declared that there had been no forfeiture of the lands by the New York Indians.

Finally, January 29, 1861 (12 Stats., 126), Congress passed the act admitting Kansas into the Union as a State, and in so doing it changed the boundaries of the State so as to make them approximately a rectangle, but still including the lands of the New York Indians. That act contains this provision:

"*Provided*, That nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory which by treaty with such Indian tribes is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory; that all such Territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until said tribes shall signify their assent to the President of the United States to be included within said State."

And especially is it shown by the facts set out in Finding XVIII (Rec. 21), both that emigration was not essential to the rights of the claimants now asserted, and that Congress explicitly recognized such to be the case. That finding

shows that, without regard so emigration or removal, Congress actually paid *in New York* certain of the sums and discharged certain of the obligations provided for by the treaty. This alone would seem conclusive of the question of forfeiture *vel non*.

6. It is conceded that the treaty of Buffalo Creek operated a grant *in presenti* to the New York Indians of the Kansas lands.

What the law of forfeiture in such a case is, is now too familiar to require extended citation. This Court, without a single qualification from first to last, has said that where there is a condition subsequent in a grant that grant cannot possibly be taken away for failure to perform the condition subsequent unless and until there is some judicial proceeding in the nature of office found, or unless and until there is a legislative act of a competent body declaring the forfeiture. It is sufficient to refer on this point to the well-known case of *Shulenberg vs. Harriman*, 21 Wallace, p. 63.

If to what is there said there be added the consideration already mentioned, that the Indians are not *sui juris*, but are the wards of the nation, the principle enunciated by the Court is given peculiar force and application.

7. As the court below dismissed the petition, it of course did not go into the question of the respective rights of the different claimants. Assuming that in case of a reversal this Court will either itself render such a judgment as will define these respective rights, or that it will, in remanding the case to the Court of Claims, give that court proper direction in the premises, the question will be here considered.

In view of the fact that in settling with the Tonawanda band the Government assumed a valuation of the Kansas lands at \$1 per foot, and the Court of Claims reports evidence tending to show that the lands at the time they were

thrown into the public domain were worth more than that sum, it is manifestly impossible to state any account between the Government and the claimants for consideration on this hearing, except on the assumption that the value per acre be considered at \$1. The claimants earnestly contend that this sum is too small, but appreciate the fact that because the testimony is not before the Court it cannot fix a different sum. It is therefore submitted that in case of reversal the most that can be done by this Court at this time is to remand the case to the Court of Claims, with instructions as to the manner of stating the account. In the view of the claimants the account should be stated on the following principle:

From the 1,824,000 acres of land granted by the treaty should be deducted the 10,240 acres allowed to members of the Hogeboom party and the 208,000 acres estimated for in the Tonawanda treaty, leaving a remainder of 1,605,760 acres. These should be compensated for at their proper value at the time they were opened to settlement, which value there is evidence to show was greater than the price received for them by the United States (Rec., 22, Finding XX). The claimants should be allowed the removal and maintenance sum of \$400,000, less the sum of \$48,000 paid the Tonawandas on account thereof, being the sum of \$352,000. The claimants should be allowed the sums agreed by the treaty to be paid in cash to separate tribes and individuals of the claimants, amounting to \$18,500, and also to the income of the amounts agreed to be invested for the Cayugas and Onondagas, being respectively \$2,000 and \$2,500, from the date of the proclamation of the treaty, or, at least, from the throwing open of the lands to settlement. The claimants should be charged with the sum of \$12,625, being the aggregate of the amounts paid to tribes and individuals, as set forth in Finding XVIII (Rec., 21), and also with the sum of \$9,797.11 expended, as shown by the same finding.

Argument is unnecessary to establish the right to allowance for the 1,605,760 acres of land if the claimants have any rights at all in the premises.

The several sums agreed to be paid in cash to the separate tribes of the claimants, aggregating \$18,500, are clearly to be allowed as sums agreed to be paid by the Government, but not paid, notwithstanding that the Government received the full consideration in return for which said sums were to be paid, in addition to the discharge of the other obligations assumed by the Government under the treaty.

The several sums claimed as income on sums on which the Government agreed to pay income are as clearly to be allowed, because, if the Government had paid the income as agreed, the aggregate thereof at simple interest and without rests would reach only the sum now claimed. Clearly the claimants are as entitled to these sums as to the principal sums agreed to be paid and for the same reason, namely, that they form part of the consideration for which the Indians ceded their lands.

The \$400,000 stipulated to be appropriated by the United States for the benefit of the claimants by the fifteenth article should be allowed in full, less the sum of \$48,000 paid the Tonawanda band under the treaty of 1857.

This sum was agreed upon as the money consideration to be paid the claimants for the release of their title to the Wisconsin lands, for it is stated in the second article that the relinquishment of title was in consideration of the facts recited in the preamble of the treaty and of the covenants contained in the other articles to be kept and performed by the United States.

The purposes for which the money was to be applied under the direction of the President were all beneficial to the claimants and related to the improvement of their lands, to the establishment of their new homes, and for educational purposes.

If it should be suggested that as the Indians have not re-

moved the expense of removal should be deducted, a complete answer to the same is that the Indians were to be removed at their own expense under the guidance of the Government, and if the United States advanced any part of the cost it would have been properly deducted from the sum of \$400,000.

The Indians, in their tribal capacity, were not impecunious people; they were farmers living on productive lands, which supplied their family wants, and they also possessed other sources of income, which were ample to meet the expenses of removal. It is reasonable to suppose that they, like other immigrants to a new country in a like condition, would do so in the most prudent and least expensive manner.

It is very proper to assume that before any considerable number of any tribe removed they would dispose of their respective reservations, which were of large value and would supply them with ample means to defray the necessary disbursements for transportation. In case of removal they had the undoubted option to meet all disbursements from either source at their command, and if they did not call on the United States for an advancement to aid in removal the \$400,000 would remain to be devoted to the other uses mentioned in the fifteenth article.

In any view which can be taken of the provisions of this article, the fact remains that the covenant to appropriate \$400,000 remains unexecuted, except by the payment of \$48,000 to the Tonawanda band under the treaty of 1857.

Yielding to the full force of the provision that the United States, acting through the President, could in a measure dictate to which of the uses mentioned in the article the \$400,000 should be applied, the use designated would be beneficial to the Indians and would tend to enrich their estates and increase the value of their lands.

We have, then, a case similar in all material respects to that of a vendor of land who had contracted, on delivery of

possession of the premises to the vendee, at his own expense to erect houses, mills, and other buildings thereon, and also to supply teams, farm implements, etc., at a cost not exceeding a sum named, and then failing to deed the lands or to perform his other covenants.

The law in such a case determines the rule of damages arising from non-performance on the basis which we claim should be adopted to secure full indemnity to the claimants.

Respectfully submitted.

HENRY E. DAVIS,
GUION MILLER,
For the Appellants.

GEORGE BARKEP,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
Of Counsel.

N. H. S. 106.

Sup. Ct. of Davis, Miller, Choate,
Barker, Jenkins & McGowan for
Appellants.
Supreme Court of the United States.

OCTOBER TERM, 1896.

Filed Nov. 28, 1896.

No. 415.

Supreme Court, U. S.
FILED
NOV 28 1896
JAMES H. MCKENNEY,
CLERK

THE NEW YORK INDIANS, APPELLANTS.

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR THE APPELLANTS.

HENRY E. DAVIS,

GUION MILLER,

For the Appellants.

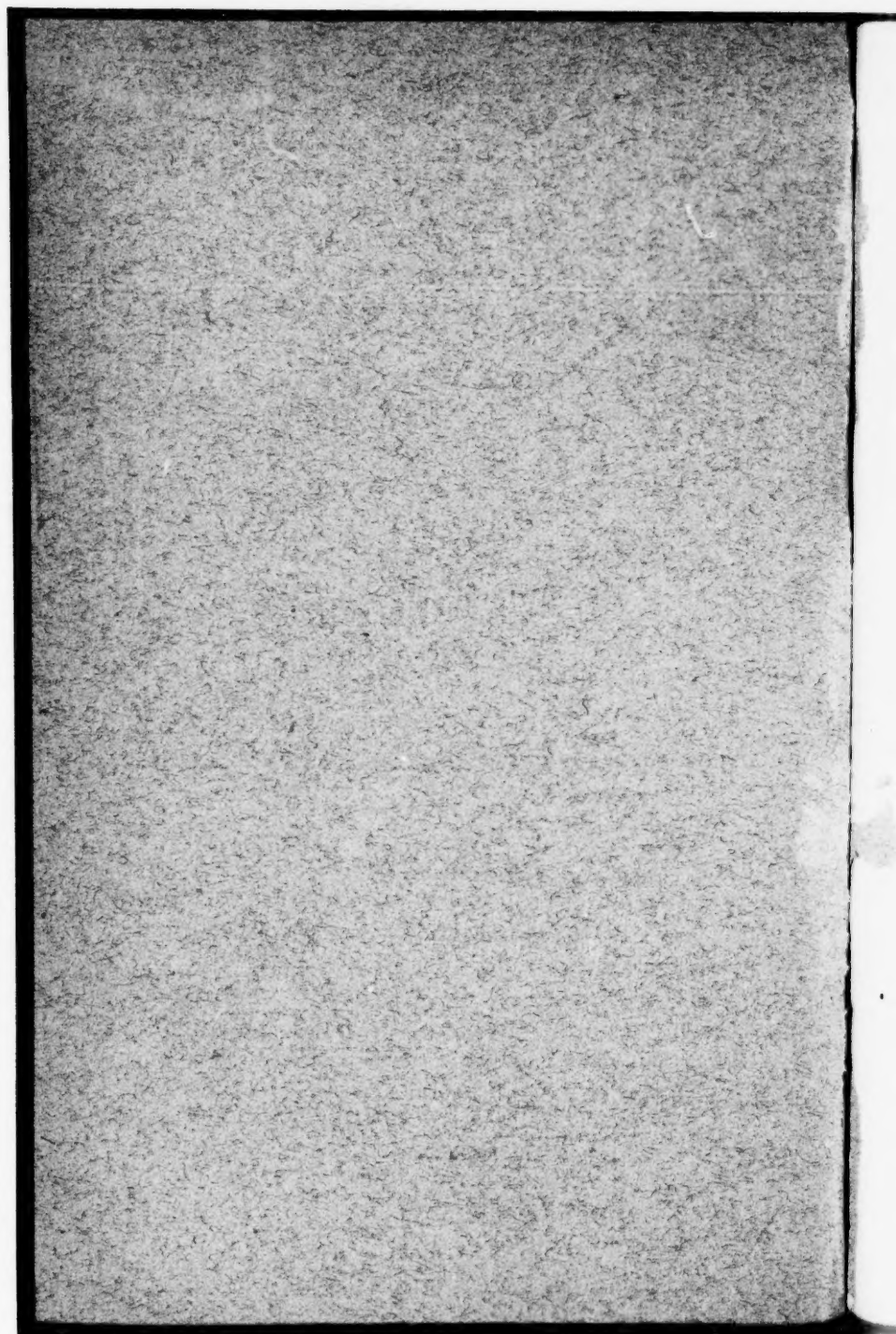
JOSEPH H. CHOATE,

GEORGE BARKER,

JAMES B. JENKINS,

JONAS H. MCGOWAN,

Of Counsel.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR THE APPELLANTS.

In view of the protracted argument presented in the brief for the United States and the stress therein laid upon the questions of consideration and abandonment, it is deemed advisable to submit the following additional brief for the appellants.

For the Court's convenience the principal treaties referred to and the findings of the Court of Claims on the first hearing of the case are printed in an appendix.

I.

On January 21, 1884, the Senate Committee on Indian Affairs made an order under "the Bowman act," so called, of March 3, 1883, referring the claim of the appellants to the Court of Claims for the investigation and determination by that court of the facts involved in the case. That court reported to the Senate its findings, of date January 11, 1892, which findings are printed in the Appendix (pp. 39-49). The Senate Committee on Indian Affairs, on these findings, recommended the passage of the act, which is printed on page 4 of the Record. This act conferred upon the Court of Claims jurisdiction to entertain the claim of the appellants and enter judgment thereon.

The appellants, claimants below, are designated by the name of The New York Indians and are found by the Court of Claims to comprise the following nations or tribes, namely: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns. (Rec., p. 7.)

The rights of the appellants turn upon the provisions of the treaty of Buffalo Creek of January 15, 1838. On that date the New York Indians had an Indian title to 500,000 acres of land in the State of Wisconsin, upon which at that time a part of them resided. This land was secured to the Indians by the treaties of 1831 and 1832, to be found in the Appendix, on pages 1 to 17. The important provision of the treaty of Buffalo Creek was in fact for an exchange of lands, the New York Indians releasing and surrendering the Wisconsin lands and the United States conveying to the Indians a tract of land in the then Indian Territory, described by metes and bounds and containing 1,824,000 acres of land, being at the rate of 320 acres for each of the Indians as their numbers were then computed. In addition, the treaty contained a stipulation for the removal of the

Indians to their new lands. On the proclamation of the treaty, made April 4, 1840, the United States surveyed and made part of the public domain the Wisconsin lands and afterwards disposed of the same. In March, 1859, by order of the Secretary of the Interior, the new lands were surveyed and made part of the public domain and sold by the United States at the net price of \$1.22 per acre, but the evidence before the Court of Claims tended to show that the lands were of greater value at the time they were made part of the public domain.

Furthermore, by the treaty of Buffalo Creek the United States agreed to appropriate the sum of \$400,000, to be applied to aid the Indians in removing to their new lands and supporting themselves the first year after their removal, etc. The numbers of the New York Indians at the time of the treaty were fixed by the treaty at 5,485. The United States in fact appropriated only the sum of \$20,477.50 to aid in the removal of the Indians, and actually expended for that purpose only \$9,797.11 of that amount. The claim of the appellants is founded upon the non-performance by the United States of its stipulations in the premises and making the new lands a part of the public domain and disposing of the same.

The issues of fact presented by the pleadings are made by the petition and the pleas of the United States. These issues are limited by the pleadings to the truth of the allegations set forth in the petition, for the United States interposed a general denial only, and did not plead any special matter in controversion or avoidance of the claims set up in the petition.

The jurisdictional act in the case conferred upon the Court of Claims special jurisdiction to hear and enter up judgment upon the claim of the appellants, at the same time authorizing the court to adjudicate the case upon the findings of fact previously found and reported to the Senate,

as above stated, or to take other evidence as to the facts. That court, however, treated the case *de novo*, and its findings as contained in the record differ materially from the original findings. It is contended by the appellants that in this the court departed from the purpose of the jurisdictional act, and that its judgment should have been rendered upon the original findings and such additional facts not contradictory to those findings as might be established; but, however that may be, it is clear that the United States must be confined to the issues made by the pleadings, and cannot be heard to allege that some one or all of the several tribes of Indians either abandoned the treaty or had accepted a sum of money in relinquishment of any claim growing thereout.

So far from appearing captious, this point is of the first importance; for the United States now rely on an assumed forfeiture and abandonment by the Indians, neither of which defenses is made by the pleadings and neither of which can prevail unless the same be made clear affirmatively by the United States. The claimants earnestly contend that this view cannot be disregarded, because the evidence on which the Court of Claims based its findings is not returned, and this Court must of necessity be guided by the pleadings and findings alone. Under the jurisdictional act the Court of Claims was bound by the general rules of law regulating its practice, except so far as they are modified by the act to meet the features of this special case, and no such modification is to be found in the act except as to the question of limitations, which by the terms of the act is eliminated.

See *Vigo's case*, 21 Wall., 546.

II.

The first question which presents itself is, What interests and rights were acquired by the New York Indians to the Wisconsin lands? And to answer this question we must first

consider the title of the Menomonees and Winnebagoes to those lands.

At the conclusion of the Revolution the Indians were in admitted occupation and right of possession and perpetual enjoyment of the soil occupied by them, subject only to the pre-emptive right of the Sovereign. The Menomonees and Winnebagoes at that time were in occupation of a large tract of country bordering Lakes Superior and Michigan. The British Crown acknowledged the rights of the Menomonees and Winnebagoes in these lands, but secured by treaty from them the right of pre-emption. The same sovereignty dealt with these Indians in relation to their lands as though they were owners thereof, but never coerced a surrender of them. In succeeding to the rights of the British Crown in respect of the Indians the United States took the same position and adopted the same policy (3 Kent Com., 466). The Constitution of the United States, by declaring treaties made and to be made the supreme law of the land, adopted and sanctioned the previous treaties with the Indian nations, and of necessity admitted their rank among those powers capable of making treaties, as well as their rights as then established and understood (6 Peters, 515; 2 Stats., 146). These rights involved a right of possession by the Indians perpetual in the tribes and such as could never be taken from them without their consent and by treaty (*Mitchel vs. U. S.*, 9 Pet., 711). Accordingly, by a universal rule, every purchase of lands by the Indians and every assurance to them made by treaty was held to give a good title, and the Indians' rights of both possession and alienation of lands secured to them were amply protected and guaranteed by the Sovereign. (*Ibid.*; 2 Stats., 146, 147, and notes; *Clark vs. Smith*, 13 Pet., 195; 5 Pet., 1.)

The relations of the Menomonee and Winnebago tribes and the Six Nations of New York Indians among themselves and to the British Crown were transferred to the United States by the treaty of November 19, 1794 (2 Stats.,

146, and notes). On January 3, 1816, the United States made a treaty with the Winnebagoes by which the rights of the latter were fully recognized and protected (7 Stats., 144). Similarly, by treaty of March 30, 1817 (7 Stats., 153), the rights of the Menomonees were recognized and protected; and since these treaties those two tribes have been treated as distinct political communities, holding their lands by a right to be extinguished only in return for good and sufficient consideration. (See 1 Stats., 307, 309, 323, 377, 379, 384, 424; 20 Johns., 896; 51 Barb., 590; 6 Pet., 515; 8 Wheat., 540.) Stated least favorably to the Indians, the unquestioned law has always been, as recognized by this Court, as follows:

“The Indians are admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will except to the Government claiming the right of pre-emption. Whatever that right or title, the Indians had an unquestioned right to the lands they occupied until that right should be extinguished by a voluntary cession to the Government.” (5 Pet., 1; 3 Kent, 461.)

Such undoubtedly was the title of the Menomonee and Winnebago tribes to the Wisconsin lands when they ceded them to the appellants.

We pass on to consider the title of the appellants to their lands in New York.

By treaty of October 22, 1784 (7 Stats., 715), the United States received the Six Nations of New York Indians into their protection and guaranteed them that they should be secured in the possession of their lands. The engagements with the Indians in the premises were renewed January 9, 1789 (7 Stats., 33), and again by treaty of November 11, 1794 (7 Stats., 45), the United States acknowledging the lands reserved to the New York Indians in their respective

treaties with the State of New York to be their property and agreeing never to claim the same or disturb them or any of the Six Nations or their Indian friends residing on the lands and united with them in the free use and enjoyment thereof.

The treaty of Buffalo Creek transferred to the United States no claim or interest whatever in the New York lands.

In 1810 the Six Nations of New York Indians inquired of the President of the United States whether the Government would consent to their moving into the neighborhood of their Western brethren, and whether the Government would acknowledge their title to any lands which they might there procure by gift or purchase, and whether then existing treaties would in such case remain in full force and their annuities be paid as theretofore (7 Stats., 550; finding 2, Rec., p. 7; Sen. Doc. 189, 27 Cong., 2d sess., pp. 7, 8). All the requests of the Indians in the premises were granted (Sen. Doc. 189, *supra*, p. 10).

This makes it plain that the Court of Claims was in error in saying that the main important object of the United States was to move the Indians West, and that the endeavor to accomplish this object led, first, to the grant of the Wisconsin lands. In point of fact, as is abundantly manifest, the Wisconsin lands were secured to the Menomonees and Winnebagoes and the New York Indians respectively, as above shown, long before the treaty of Buffalo Creek, and the idea of removal West originated with the New York Indians themselves. Action of the Government in respect of removing the Indians West did not take form as a policy until long afterwards (2 Stats., 142). The Court of Claims did not find, nor is it true, that the United States made a grant of lands in Wisconsin to the New York Indians at any time. The Wisconsin lands were purchased and paid for by the claimants with moneys and goods received by them on the sale of certain of their lands to the State of New York, and they paid out large sums for ex-

ploring expeditions for the lands purchased by them and the removal of their people thereto (Sen. Doc., *supra*, p. 5); and so far from the Government's seizing an opportunity to pursue its policy of removing the Indians West, as is the opinion of the Court of Claims (Rec., pp. 26, 29), the fact is that in 1810 the claimants petitioned the President for permission to remove; that before the treaty of Buffalo Creek they petitioned the President to take their Wisconsin lands and permit them to remove to the Indian Territory (7 Stats., 550), and that prior to November 24, 1845, they made application to the Government to be removed again and again, but the Government "did not deem it expedient to enter into any arrangement for that purpose." (Finding 12, Rec., p. 19.)

It is, therefore, plain that there was at the time no avowed *bona fide* policy of the Government on the subject, and that the United States did not attempt to remove the claimants from their New York lands, which would have been in violation of the guarantee to defend them in their possession and never to disturb them in the free use and enjoyment of their lands. In truth, the memorial of 1810 had for its object not the removal of the Indians from New York, but only provision for the coming generations, for the numbers of the Indians in New York were increasing, so that it was foreseen that their old homes would soon be inadequate to support the increased population, and the inquiry of the President was⁶ distinctively whether the title of the Indians to their new lands would be acknowledged and their annuities continued. The Wisconsin lands were bought by the New York Indians in 1821 and 1822, before the Indians were put under any obligation to remove to them either as tribes or as individuals, and nothing could be further from the truth than the statement in the opinion of the court below that "the United States gave the New York Indians land in Wisconsin for emigration."

Notwithstanding the contentions of counsel for the United

States and the opinion of the Court of Claims, it may surely be said, with all respect, that further argument is unnecessary in support of the proposition that the Menomonees and Winnebagoes had title to the Wisconsin lands amply sufficient to furnish consideration for any bargain in relation to those lands; that the New York Indians were similarly entitled to their lands; that the United States gave nothing to the New York Indians except their approval of a bargain, and the New York Indians by assenting to the Menomonee treaty of 1831 enabled the United States to become possessed of 2,500,000 acres of land in Wisconsin, but otherwise had no dealings with the United States in relation to the Western lands antedating the treaty of Buffalo Creek; and that the so-called policy of the Government to remove the Indians West cut no figure whatever as a consideration for the assent by the United States to the purchase by the New York Indians of the Wisconsin lands. The United States had not even the right of pre-emption in the New York lands, and the claimants had actually purchased of the Menomonees and Winnebagoes and paid for at least a joint interest in 5,500,000 acres of land with the Government's approval. The dealings between the Menomonees and the Winnebagoes, on the one part, and the United States, on the other, after the cessions to the New York Indians of 1821 and 1822, culminated in the Menomonee treaties of February 8, 1831, and October 27, 1832, which are greatly enlightened by the Senate document above mentioned, the whole of which is of great interest and importance in the consideration of this case, but which is too voluminous to be printed here. These treaties of 1831 and 1832 (App., pp. 1, 12) show clearly that out of the 5,500,000 acres in Wisconsin in which the New York Indians might justly have claimed at least a full half interest they received only 500,000, and that of the remaining 5,000,000 acres the Menomonees ceded and the United States received one-half. So far as the New York Indians were concerned, this was sheer spoliation, for the

sums agreed by the treaties to be paid by the United States on behalf of the New York Indians were not only insignificant in the extreme, but also were paid to the Menomonees for what was in fact already the property of the New York Indians; but the New York Indians having in 1832 assented to the dealings of the Menomonees with the United States, their title to the 500,000 acres of Wisconsin lands became assured, and, as found by the Court of Claims (Rec., p. 28), was fully recognized by the Government, and the court most properly found that the rights of the New York Indians in those lands were so substantial as to furnish a sufficient consideration for the agreement expressed by the treaty of Buffalo Creek, which agreement the court sustained "as a valid agreement, having all the necessary elements of a binding contract." (Rec., p. 32.)

It follows unavoidably that the claimants having a good and sufficient title to the Wisconsin lands which they gave up to the United States, they acquired a full and sufficient title to the Kansas lands of the nature and character intended to be secured to them by the treaty of Buffalo Creek. By the granting clauses of that treaty the intention of the parties was fully and effectually secured, as the same is recited in the preamble to the treaty and also clearly manifested by the terms of the grant. Not to repeat the provisions of the treaty *in extenso*, it is clear beyond peradventure that the effect of those provisions was to give the United States the Wisconsin lands in exchange for the Kansas lands.

It is manifest, also, that it was the intention of the treaty to secure to the New York Indians an estate in the Kansas lands of the same nature and duration conceded on all hands to have been vested in the several Indian tribes at the time of the formation of the Government. Again, the title and estate intended to be conveyed to the New York Indians is clearly defined in the granting clauses of the treaty by the use of the words "to have and to hold the

same in fee-simple to the tribes and nations of Indians by patent from the President of the United States, issued in conformity with the provisions of the third section of the act" approved May 23, 1830. One of the provisions of that act is "that in making any such exchange it shall and may be lawful for the President solemnly to assure the tribes and nations with whom the exchange is made that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and, if they prefer it, the United States shall cause a patent grant to be made and executed to them for the same, provided always that such lands shall revert to the United States if the Indians become extinct or abandon the same." (4 Stats., 411). Plainly, this gave the Indians a base or determinable fee, and, as this Court has specifically held, an exchange or purchase of lands made by treaty under such conditions gave a good title to the Indians on ratification of the treaty without the formality of patent from the United States. (*Mitchel vs. U. S.*, 9 Pet., 711.)

Again, in order to carry out the object and purpose of the treaty it was necessary to vest in the Indians an estate of the nature and character mentioned, for it is declared in the treaty that the lands were to be set apart as a permanent home for the Indians who desired to remove, and the United States promised and agreed to protect them in the peaceable possession of the lands and secure to them the right to establish their own form of government, appoint their own officers, and administer their own laws. This effected a title to the Indians *in presenti*, just as such title was secured to the Indians in the Wisconsin lands. The patents contemplated would be only by way of additional muniments of title and not essentials thereto. (1 Washburn, Real Estate, chap. 3, p. 57, articles 1 and 2.)

Beyond all controversy, the promises and stipulations of the treaty of Buffalo Creek to be performed by the United

States amounted in legal effect to a bargain and sale to the Indians of the Kansas lands and secured to them the right of possession and use of the same by a title equivalent, for all practical purposes, to a fee-simple. The treaty operating an exchange of lands and the United States having procured the lands intended for them, it is unavoidable that the Indians were entitled and intended to be put in as good a position in relation to the lands to come to them. The grant to the Indians, although of a legislative or treaty character only, was as effective as though made by deed of the most technical character. (1 Washburn, 72; *Rutherford vs. Green's Heirs*, 2 Wheat., 196; *Fremont's Case*, 17 Howard, 599; 9 Ops. Att'ys Gen., 253. See also 3 Washburn, 330, 331; *Hunt vs. Johnson*, 44 N. Y., 27.)

It is to be further noted in this connection that the provisions of the treaty of Buffalo Creek in relation to the Senecas and Tuscaroras unmistakably indicate that the Indians should take a present and immediate interest in the Kansas lands. By the tenth article of the treaty the Senecas sold and conveyed their rights in the New York lands to Ogden and Fellows, who had secured the pre-emptive right of purchase thereof, and the additional treaty of 1842 (Appendix, p. 33), merely secured to the Senecas the right to remain on their New York reservations until they should surrender them to Ogden and Fellows in accordance with the treaty provisions. It is submitted that counsel for the United States wholly misapprehend the meaning and effect of the treaty of 1842, which does not involve any release by the Senecas of their interest in the Kansas lands or of any of their rights under the main treaty, but only makes a provisional arrangement between the Senecas, on the one part, and Ogden and Fellows, on the other, in amendment of the original agreement between those parties as contained in the main treaty. So plain is this to counsel for the claimants that it seems to them unnecessary to do more than to

ask a reading by the Court of the two treaties together. The same remarks apply to the case of the Tuscaroras, and this branch of the case may be dismissed with the remark that, without giving to the treaties the construction contended for by counsel for the claimants, the Senecas and Tuscaroras were without one acre to which they had title or which they could rightfully remove to and occupy.

It would seem unnecessary to revert to the question of consideration, but so much is said on that subject by counsel for the United States and the court below that it may not be amiss to add a few words on the subject.

As already pointed out, the court in its opinion (Rec., p. 32), distinctly holds that the New York Indians had a valuable interest in their New York lands, sufficient to furnish consideration for a contract, and that similarly they had a valuable interest in the lands in Wisconsin. The court truly says, "The amount and sufficiency of the consideration it is no part of our duty to consider. We should not and we cannot decide whether the bargain was more advantageous to the plaintiffs or to the defendants." There was manifestly no escape from this position. It is surely too late to argue to this Court that parties to a treaty are bound by the recitals therein, and the recitals in the treaty of Buffalo Creek would seem to put the question of consideration beyond all doubt. Outside of its recitals, it is indisputable, as matter of fact, that the Wisconsin lands which the claimants gave up were taken by the United States and parted with for what seemed to the United States sufficient value. Surely this must close all discussion of the subject, and leave for consideration only the question propounded by the court below in its opinion, namely, "whether any rights secured by the treaty have been violated."

If it be deemed necessary to sustain the proposition that the Indians and the United States alike are bound by the recitals in the several treaties and their preambles involved

in the case, reference may be had to the following authorities:

Torry *vs.* Bank of N. O., 9 Paige, 659, and cases cited.

Carver *vs.* Jackson, 4 Pet., 83-'8.

Doe *vs.* Wilson, 23 How., 457.

Bell *vs.* Brewer, 1 How., 184.

U. S. *vs.* Rening, 18 How., 343.

U. S. *vs.* Peralta, 19 How., 343.

Choctaw Nation *vs.* U. S., 119 U. S., p. 28.

Little *vs.* Watson, 32 Me., 224.

The peculiarly forcible application of this principle to cases of treaties with Indians and the liberal construction in favor of the Indians to be given thereto is adverted to in the main brief and need not be here repeated. (See the main brief, pp. 23 and 24.)

In leaving this branch of the case one fact dwelt upon by the court below may be thought to deserve passing notice. The court seems to have considered as of importance the fact that the United States did not by the treaty of 1838 acquire from the claimants any of their New York lands. This is true and as unimportant as true. The case in its simplicity is this: The relations of the Indians to the Sovereign were substantially settled at the time of the American Revolution. The rights of the Indians to any lands in the United States were determined by those relations as recognized by the Sovereign. On the achievement of independence the United States took the place of the British Crown as Sovereign over the Indians. The claimants owned certain interests in New York lands and some of their Western brethren owned certain interests in Wisconsin lands. Moving wholly within proper limits, the claimants and their Western brethren came to an agreement whereby the former acquired certain of the Wisconsin lands. The

United States, as Sovereign, came into the case and gave the Sovereign's approval to the transaction as expressed in the earlier treaties, so that at the time of the treaty of Buffalo Creek the claimants were recognized as having sufficient title to 500,000 acres of the Wisconsin lands to furnish consideration for a contract with the Sovereign. This interest the Sovereign wanted, and in consideration of receiving it agreed to give the claimants the Kansas lands. The New York lands therefore played no part in the transaction so far as the United States were concerned, and the only relation which the United States had to those lands was that inasmuch as the Indians were the Nation's wards they could not contract with a third party without the approval and consent of their guardian. To this extent only have the United States any interest as to what became of the claimants' New York lands, and the United States assented to the dealings of the claimants in relation thereto without asking or expecting to get any part of those lands. Plainly, therefore, the question whether the United States got any part of or interest in the New York lands is of no importance in the premises.

III.

We come now to consider the question upon its view of which the court below most relied in dismissing the petition of the claimants. Said that court :

"The Buffalo Creek treaty has vanished, leaving no rights or duties behind it in so far as this litigation is concerned." (Rec., p. 41.)

At the risk of tediousness this position must be examined at length, although it is deemed that what is said in the main brief on the point is unanswerable.

In the outset, it may be assumed that a treaty is the supreme law of the land, and that it is in its nature a contract,

which can no more be violated without liability than can any other contract. It may be further assumed that the only party having a right to disclaim a contract, where there has been a breach, is the party injured by the breach. As in any other case of contract, the party injured may waive the breach and proclaim a rescission, or he may assert the contract and demand satisfaction for the breach.

Again, it may be assumed as unnecessary to argue that where one of the parties to a contract has received all the benefits contemplated to be received by him under the contract his mouth is closed to assert non-performance of his own obligations as establishing a rescission or abandonment of the contract. The court below found that the claimants did all that was required of them under the treaty, and that the United States got the whole consideration moving it to enter into the treaty. It would seem that this ought to be the end of the argument; but the further fact is established by the findings that, although by the terms of the treaty and the decisions of this Court it was incumbent upon the United States to initiate and carry out the provisions of the treaty in relation to the removal of the Indians, the President did not take the first step looking to such removal, namely, the prescribing of a time therefor. Congress never made the necessary appropriations in the premises, and the Secretary of the Interior threw the Kansas lands open to settlement, and they were disposed of by the United States, which received all the proceeds thereof. To avoid what would seem the inevitable liability of the United States in the premises, the court below holds that the claimants in effect abandoned the treaty and consented to forego all claim upon the United States resting thereon.

As is above pointed out, the Government is in no position under the pleadings to set up such a defense; and, moreover, it is in no position to do so, in view of the unquestioned fact that it received and disposed of the whole consideration moving to it, and is in no position to restore to the claim-

ants their *status quo*. Furthermore, as will be more particularly dwelt upon hereafter, the claimants or some of them, in the beginning of the manifestation by the Government of its purpose to disregard its obligations under the treaty, vigorously protested against such action, and have since steadily kept their protest good.

It may be assumed as not open to question that by throwing the Kansas lands into the public domain and disposing of them the Government disabled itself to keep its agreement with the claimants after such act. So far, therefore, as the question of abandonment is concerned, it is really necessary only to consider the conduct of the parties down to the time of that act, namely, the year 1859 or 1860; but there is in the conduct of both parties since the latter year much that throws a strong light on the question.

It is to be observed preliminarily that so far as the question of transfer of titles is concerned the treaty of Buffalo Creek was an executed as distinguished from an executory contract. The court below properly held the treaty to be one for an exchange of lands, and the language of the treaty, as above pointed out, unquestionably operates grants to the respective parties *in presenti*. It would seem to follow of necessity that either each of the parties should have what was stipulated for or that neither should have anything.

The court below in effect held that while the Government got what it bargained for the claimants by their course of conduct have yielded and abandoned their right to what they bargained for. In other words, the position of the court is that the Indians agreed to give and did give the United States certain lands, and the United States agreed to give and did not give the Indians certain other lands, but that the Indians have no right now to ask compensation, because their conduct shows that they abandoned their rights and have foregone any claim to receive what they bargained for.

It would seem a complete answer to this position to say that there was no consideration, real or pretended, for the abandonment by the Indians of their claims. The court's implied reply to this is and can only be that what the Indians now claim was to be given them only upon condition of their removal West, and that their conduct shows that they did not want to go West. In turn, this is directly in face of the court's own finding and holding, following this Court, that the Indians were not called upon to go West until the President should prescribe the time for their going and the Government should make provision therefor, which it is not only conceded but also affirmatively found was never done. It is not intended to repeat here what is said in the main brief as to the duty of the President and Congress in that behalf. What is directly to the point is that, according to the view of the court below, while the Indians were not under obligation to go until a time was prescribed and provision made for their going, it was yet possible in law for them to lose their rights by not doing that which they were given no opportunity to do.

It is also conceded by the opinion of the court below that whatever alleged abandonment or relinquishment there was by the Indians in the premises grew out of their assumed conduct and did not rest upon any positive action. It is held by the court that there was no refusal by the Indians to emigrate. "We do not find that such a refusal was affirmatively made" (Rec., p. 35); and again (*ibid.*): "The Government could have enforced the removal, but it not only took no steps to that end, but failed to provide the means required of it by the treaty to pay for the removal. It has been quiescent;" and still again (*ibid.*): "The subject-matter of removal was left to the discretion of the President, and this discretion was not limited to a period of five years nor to any other period;" and still again (Rec., p. 42): "The United States did not wish to force an emigration, and both parties

remained quiescent until the Government decided to appropriate the Kansas land and to sell it to white settlers. When this had been done, the defendants, by their own act, became unable to fulfill any financial obligation imposed upon them by the treaty of Buffalo Creek."

In view of all this it is inconceivable how the court could have held that the treaty of Buffalo Creek is eliminated from the discussion. (*Ibid.*)

IV.

We pass to consider the conduct of the parties as shedding light upon this holding of the court below, namely, that the treaty was eliminated or vanished or was abandoned.

In considering this question we are embarrassed by the somewhat inconsistent opinion of the court, which seems to hold not so much that the treaty itself was abandoned as that there was an abandonment by the claimants of the idea of emigration, evidenced by what the court calls their quiescent attitude. If it be contended that the treaty was abandoned there is one answer; but if it be contended that the Indians, after having secured the privilege of removal at the expense of the Government gave up that privilege, there is quite a different answer.

The counsel for the Government in their brief would seem to treat all that is promised to the claimants by the treaty as matter of grace, and in this connection lay much stress on the question of consideration. As to this it would seem too plain for argument that the question of consideration is not open, for, among others, the reasons already given as to the force and effect of treaty recitals. Nevertheless, counsel for Government again raise this question, and attempt to maintain in substance that as the United States paid for the Wisconsin lands for the benefit of the Indians there can be no claim of consideration set up by the latter.

If there be any force in what was said by this Court in the case of *The Old Settlers*, 148 U. S., 466-'7, it is certain that the treaty of Buffalo Creek concludes this question. By the treaty the Government indubitably recognized the Indians as having an interest in the Wisconsin lands of sufficient value to form a consideration for the grant of the Kansas lands. But if it be permissible for the Government to go back of the treaty of Buffalo Creek to the Menomonee treaty of 1832, to help out its defense, it is undoubtedly equally permissible for the claimants to go back of the latter treaty in order to bring attention to the whole history of the case. It is felt to be a work of supererogation to do this, but at the expense of criticism on that score the facts may be briefly recited.

Prior to 1827 the claimants had purchased with their own funds, from the Menomonees, the Indian title to over 5,500,000 acres of land in Wisconsin, to be held in common with the vendors. The purchase of a considerable portion of this tract was expressly approved by the President, and the claimants were officially notified that the President considered their title to every part of the tract as equally valid as against the vendors (findings 2 and 3, Rec., p. 79); and this was accompanied by distinct notice that by this official sanction the President did not mean to interfere with nor in any manner invalidate their title to all lands acquired in Wisconsin, including those not confirmed by Government. Subsequently, by the treaties of 1827 and 1831, between the United States and the Menomonees, the United States secured and took possession of over two millions and a half acres of the Wisconsin lands (finding 4, Rec., p. 9), and paid the Menomonees therefor, but did not pay anything to the claimants. On the contrary, the United States induced the claimants to relinquish their rights to all of the said tract except 500,000 acres, and even as to that imposed the condition that the claimants should forfeit all rights to these

lands on failure to remove to the same within such time as the President should prescribe. It is to be observed that the claimants, not being parties to the treaty, are not bound by the recital in the treaty of 1831 that the Menomonees protested that they had not sold the lands to the claimants or received any value for them, and also that the court below, after full investigation, distinctly found the facts to be against this contention of the Menomonees. (Findings 2 and 3, Rec., p. 7 to 9). So also the treaty of 1831 recites that the 500,000 acres of land were ceded to the United States for the benefit of the claimants in consideration of the payment of twenty thousand dollars by the United States to the Menomonees; but the fact is not only that the title to these 500,000 acres was already in the claimants, but also that they were entitled to a considerable portion, if not all, of the 2,500,000 acres ceded by that treaty to the United States and for which the Menomonees alone were paid.

In view of these facts, it is plain that there is no warrant for the statement of counsel for the United States (Brief, pp. 23-25), that the title to the 500,000-acre tract in Wisconsin was acquired by the claimants at the cost of the United States, and that by the treaty of Buffalo Creek they ceded what cost them nothing, or that this tract was secured to the claimants for a small money consideration paid by the United States to the Menomonees. Stated in its simplicity, the case is, as to this point, that prior to 1827 the claimants had a recognized Indian title to between two and a half and three million acres of land in Wisconsin, and that by the treaties of 1827 and 1831 with the Menomonees and the treaty of Buffalo Creek with the claimants the United States exchanged places with the claimants as to these lands and became vested with the title thereto, and that the claimants have received for them nothing and can receive nothing except what may be awarded them in this cause.

The question of consideration is thus clearly out of the way.

The conduct of the parties after the treaty of Buffalo Creek is wholly inconsistent with the idea of an elimination or vanishing or abandonment of the treaty. It cannot be contended that there was any rescission of the treaty. The court below, in fact, found that there was no rescission. That court says (Rec., p. 41): "The treaty failed; it was not rescinded; it was not violated, but it did not accomplish its full purpose;" and that there was no rescission is plain on familiar principles. There could be no rescission without mutual act, and it is not pretended that there was any act on the part of the Indians expressing a rescission or purpose to rescind. The brief for the Government in effect concedes this; but, apart from any such concession, expressed or implied, the record fails to show any act which, by any strain of language, could be characterized as a rescission.

Nor was there any waiver of the treaty; for the reason that by the failure of the United States to take the initiative, which was incumbent upon it in respect of prescribing a time for the removal of the claimants and making provision therefor, the claimants were never put in a position in which a waiver could be predicated of any act or conduct of theirs. On the contrary, by its course of dealing with the Indians, presently to be alluded to, the Government clearly indicated its view that the Indians asserted and relied upon their rights under the treaty from the first; and, indeed, the only application of the doctrine of waiver to the case applies to the conduct of the United States as evidenced by its dealings with the Indians, and can have reference only to the question of forfeiture.

And, as pointed out in the main brief (pp. 20 to 22, 32), there is no room in the case for this question of forfeiture. The record fails wholly to show any act or conduct by the claimants of which forfeiture may be predicated. On the contrary, the duty and obligation of removal and provision after removal being on the United States, and that duty not having been performed; the impossibility of the

removal of the claimants without the aid of the Government being clearly apparent, and the claimants really never having had any opportunity to do any act which might work a forfeiture, and none of the essentials to a forfeiture existing in the case, it is almost inconceivable that the Government should even pretend that a forfeiture was worked.

Moreover, the very quiescent attitude of both parties, which is assumed by the court as the basis of its conclusion that the treaty was eliminated or vanished, has a directly contrary significance. If the initiative in carrying out the purpose of the treaty was on the United States and that initiative was never taken, how is it possible to talk of abandonment? That the initiative in the matter was on the United States may be assumed as established. This Court said so in *Fellows vs. Blacksmith and New York vs. Dibble*, cited in the main brief (pp. 25, 26), and again said so in *United States vs. Kagama*, 118 U. S., 375, 385. Out of abundant caution, however, attention is asked to certain provisions of the treaty which of themselves are conclusive of this question.

By article 5 the Oneidas are allotted a specified place within which to have their share of the Kansas lands, though what that share would be is not stated, depending, as it did, on the number which should go. It was provided that "the same shall be so laid off as to secure them a sufficient quantity of timber for their use." Who but the United States was to point out these lands to the Oneidas and lay them off as promised? And how could the Oneidas go to Kansas until those things had been done?

So, by article 10 the Senecas and the Cayugas and Onondagas residing with them were promised that their share of the lands should be in a certain part of the Kansas reservation, with this significant addition: "and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto sufficient timber land for their accommodation." How was it possi-

ble for the Senecas, Cayugas, and Onondagas to enter Kansas without the guiding hand of the United States?

Similar provision for the Tuscaroras is made by article 14, with the important difference that if on arrival they should not be satisfied with the location assigned them they should "have their lands at such place as the President of the United States shall designate."

But what about those tribes whose lands were not specially designated in the treaty? Recurring to article 5, we see that they were "to have such as shall be set apart by the President." Is it not beyond all need of argument or possibility of denial that none of the Indians could go to Kansas until they knew where to go and what lands to occupy? and that the initiative in this respect, as well as in respect of fixing a time and making provision for removal, was on the United States? To repeat, therefore: if the initiative was thus upon the United States, which did not take it, how is it possible to talk of abandonment?

But the case does not rest on this negative position. The plain fact is that by conduct the most positive of the parties the idea of abandonment is wholly excluded. A very brief exposition of that conduct would seem to make this too clear for argument.

In the first place, all that was to be done on the part of the claimants was done by the mere execution of the treaty. They ceded their Wisconsin lands to the United States and agreed to accept in lieu thereof the lands in Kansas and to be removed thither. The contract expressed by the treaty, so far as it imposed any obligation on the claimants, was completely executed on the ratification of the treaty.

In the next place, the obligations assumed by the United States, if those obligations involved the devotion by the United States of the Kansas lands to the use and occupation of the claimants and their removal thither, have never been performed, and it is a begging of the question to say that the United States has not failed in its performance of its obli-

gations under the treaty, for the very question is what those obligations are or were.

And again, the conduct of the parties is conclusive against any forfeiture or rescission, waiver, abandonment, elimination, or vanishing of the treaty. In fact, the position taken by counsel for Government in the court below was that there was no abandonment or rescission of the treaty, but an abandonment by the claimants of the idea of emigration.

In 1843 (5 Stats., 612) the Government appropriated money to aid in the removal of certain of the claimants and made provision therefor. In 1845 (Rec., p. 19) the Government appointed a commissioner to conduct and superintend such removal. Prior to November 24, 1845 (Finding 12, Rec., p. 19), some of the claimants made further application for removal, but it was not deemed by the Government expedient to enter into any arrangements for this purpose until it was believed that a sufficient number to justify the expenditure incident to removal were prepared to remove. In 1846, by act of June 27, Congress appropriated money to pay the claims of certain beneficiaries of the treaty under articles 9, 11, 12, and 13 thereof (9 Stats., 33, 34). By act of September 21, 1846 (9 Stats., 33, 34), Congress appropriated the several sums of one thousand dollars, four thousand dollars, and two thousand dollars in payment of other sums provided for by the treaty. On July 29, 1848, Congress made similar appropriations (Finding 18, Rec., 21; 9 Stats., 161). On May 30, 1854, Congress passed the Kansas-Nebraska act, referred to on page 30 of the main brief. On March 3, 1857 (11 Stats., 184; finding 18, Rec., 21), Congress appropriated fifteen hundred dollars for William King under article 11, in Schedule 6, of the treaty. On November 5, 1857, after the decision of this Court in the case of *Fellows against Blacksmith*, the United States made the treaty with the Tonawandas, referred to on pages 11, 18, 27 to 29 of the main brief. On May 8, 1858 (11 Stats., 259), Congress passed the enabling act for the admission

of Kansas into the Union. On May 3, 1859 (11 Stats., 430, 431), Congress made express reservation of the rights of the claimants under the treaty of Buffalo Creek, as set forth in the main brief, pages 30, 31. When the order of the Secretary of the Interior was made, March 21, 1859, directing the survey of the Kansas lands, and before they were proclaimed by the President as part of the public domain, on December 3 and 17, 1860, the claimants employed counsel to protect and prosecute their claims under the treaty, asserting in their powers of attorney that the United States had seized upon the lands, contrary to the obligations of the treaty, and would not permit the claimants to occupy the same or make any disposition thereof, and the claimants have since steadily asserted their said claims, (Finding 17, Rec., p. 21). On January 29, 1861 (12 Stats., 126), Congress admitted Kansas into the Union, expressly saving, as pointed out on page 31 of the main brief, the rights of the claimants in the Kansas lands. In addition, as shown by the records of Congress (see Congressional Globe, 35th Cong., 2d session, part 2, pp. 1634, 1635, 1637, and 1638; p. 359, 1st session, part 1, p. 791; 11 Stats., 436; Executive Document No. 1, 38th Congress, 2d session, p. 188; Executive Document Y, 40th Congress, 3d session, pp. 1, 6, 10), Congress undertook to deal with the rights of the New York Indians to the Kansas lands, and under the treaty of Buffalo Creek, with the result that on November 30, 1868, the President appointed a commissioner, with instructions to proceed to New York and negotiate by treaty the settlement of the claims now made by the claimants, and such treaty was actually made on December 4, 1868; but that treaty failed of ratification before March 3, 1871, when Congress enacted what is now section 2079 of the Revised Statutes, which declares as follows:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United

States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

This act not only left the treaty of 1868 in mid-air, so to speak, but also, in view of the fact that that treaty had actually been executed and was then under consideration, is the clearest possible proof that Congress not only recognized, but also intended to save, all the rights of the claimants in the premises.

As against all this, counsel for the United States rely quite exclusively on the proviso contained in the extract from the Executive Journal of June 11, 1838, when the treaty of Buffalo Creek was under consideration in the Senate, (Finding 10, Rec., p. 10 to 17). That proviso is as follows :

"That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant 320 acres only." (Rec., p. 17.)

In addition to what is said in the main brief (pp. 24 and 25), in relation to this, it may be added, first, that this proviso, if effective, neither added to nor took from the treaty of Buffalo Creek anything in respect of a forfeiture of all or any rights by such of the Indians as might refuse to go after being called upon so to do ; in the next place, that the proviso on its face, if it had any meaning at all inconsistent with the terms of the treaty as executed, was an attempt to add to the treaty an amendment to which the assent of the claimants was as necessary as that assent was necessary to the treaty itself ; in the next place, that if that proviso was intended to override the treaty by mere legislative action, it was necessarily futile, as being an attempt by one

branch of Congress without the concurrence of the other or of the President to pass a law. In the next place, on March 2, 1839 (same Finding, Rec., p. 17), the Senate formally resolved: "That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty of June 11, 1838, with the New York Indians, according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommend that the President make proclamation of said treaty and carry the same into effect;" and, finally, that in his proclamation of the treaty made April 4, 1840 (same Finding, Rec., pp. 17, 18), the President, reciting the action of the Senate of June 11, 1838, and a resolution of the Senate of March 25, 1840, "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included, and that, in the opinion of the Senate, the President is authorized to proclaim the treaty as in full force and operation," proclaimed the treaty *as amended* to be "word for word" as printed in 7 Stats., 550, and that he did "accept, ratify, and confirm said treaty and every article and clause thereof." Clearly, everything tentative in the nature of negotiation or provision in relation to the treaty not to be found in it, as proclaimed "word for word," can have no possible bearing upon the case and is entitled to no consideration.*

* It may be said, in passing, that the designation by the President in this proclamation of the parties to the treaty of Buffalo Creek as the "Six Nations of New York Indians" is of itself sufficient justification for the statement on page 2 of the main brief for the claimants that "these Indians are, in legal effect, the well-known Six Nations," which statement is criticised by counsel for the Government on page 3 of their brief.

It may also be said at this point that the criticism on page 8 of the

V.

Reliance is also had by counsel for the Government upon the alleged protests by some of the claimants against the treaty of Buffalo Creek, it seeming to be the view of counsel that such effect can be given to these protests as either to evidence an abandonment of the idea of emigration or to work an estoppel. It is deemed unnecessary to add anything to what has been already said on the question of abandonment.

As respects estoppel, it is difficult to see how such a question can possibly be thought to arise in the case. Aside from the legal impossibility of a guardian's asserting estoppel against his ward, it is not pretended that there is an estoppel by deed, and the only sort of estoppel that could possibly be imagined in the case is estoppel *in pais*. As to this, the only possible fact which can be referred to is the fact of the protests above referred to and described in finding 11 (Rec., p. 18). The sum and substance of these protests is that, notwithstanding the clear terms of the treaty, some unidentified individuals among the Indians protested against removal; that the Onondagas officially declared that they would not remove, and treaties subsequent to that of Buffalo Creek appear in

brief for the Government of the statement in the appellants' main brief, on page 6, that "the United States agreed that the lands secured to the claimants by treaty should never be included in any State or Territory of the Union," is equally without point. It is contended by counsel for the Government that the lands agreed not to be included in any State or Territory of the Union were the lands secured to the Indians *by patent* under the treaty. If this contention means anything, it means that the Government cannot be accused of violating that provision of the treaty, because the Government intended to secure to the Indians only lands patented to them, and that, as the Government failed to put the Indians in a position to have the lands patented, it is therefore released from its obligation. The appellants are content to let this contention stand for what it may be worth.

the statutes in relation to this subject-matter; that after the amended treaty had been assented to and ratified and until the treaty with the Senecas of May 20, 1842, the Senecas and the Cayugas and Onondagas residing with them and the Tuscaroras continued to protest against the treaty; that more than five years from the ratification of the treaty the Tuscarora chiefs declared that the tribe would not part with its reservation or move from it, whatever a few individuals might do; and that the Indian protests against the treaty were based upon the grounds that the treaty had been brought about by corrupt means, and that a considerable majority of the Indians wished to remain in New York. It is also found by the court in this connection that the Tuscaroras still occupied their reservation in New York, and that after the Seneca treaty the Indians on the Buffalo Creek reservation gradually withdrew to the Cattaraugus and Alleghany reservations, in New York.

All this seems to counsel for the appellants wholly unimportant, as much so as a general refusal to abide by a contract made by one party in the absence of actual tender of performance by the other. In addition to the fact that the claimants were never called upon by the Government to remove, and, therefore, were never put in a position in which to make an effectual or material refusal to go, and the further fact that, as stated by the court below, no such refusal was affirmatively made (Rec., p. 35), the case is that some of the Indians resisted the notion of emigration and continued, after the ratification of the treaty, the talk to that effect which had been so liberally indulged in before that event, and which had, as above adverted to, held up the treaty in the Senate for further consideration and amendment, resulting, as has been shown, in the sending of it back for further consideration by the Indians after explanation of the amendments, and its ultimate proclamation as fully assented to. It may surely be said that if the Government was satisfied to ignore the pro-

tests before the ratification of the treaty, and ratified and proclaimed the treaty notwithstanding those protests, it cannot now be heard to say that it can magnify into greater importance the protests made after the accomplished fact of ratification and proclamation. In other words, if the United States forced the treaty upon the dissentient individuals among the Indians, and took upon itself the duty of prescribing a time for them to emigrate under pain of forfeiture of all the rights secured to them by treaty, it cannot now be heard to say that, having failed in its duty to prescribe a time and make provision for the emigration, it can magnify the protests after ratification into an absolution from its duty.

Tested by the law of estoppel, it is further manifest that there has been nothing done by the Indians or any of them which could possibly work an estoppel. As already stated, the only imaginary estoppel in the case is an estoppel *in pais*. What is meant by such an estoppel is so familiar as hardly to need statement. In order to such an estoppel there must have been a false representation or concealment of material facts, done with knowledge by the party making the false representation or concealment; the party asserting estoppel must have relied upon the false representation or concealment and have been ignorant of the true state of the facts; he must have been induced to act, and actually have acted, upon the false representation or concealment, and his action must have been of a character to result in substantial prejudice were he not permitted to rely upon the estoppel. Plainly, there is no room in the case for the assertion of an estoppel. In the first place, the assumed protests of the Indians did not involve a false representation or concealment of any fact. In the next place, it is not pretended that, as matter susceptible of proof, these protests induced the United States to any line of conduct. There is nowhere in the record, nor can there be produced from any source, the slightest evidence that the United States forebore to pre-

scribe a time for removal because of any conduct on the part of the Indians. In the next place, the United States has suffered no change of position or condition to its prejudice; for if it be said that but for the protests the Kansas lands would not have been thrown open to settlement and the United States thereby deprived of its opportunity to perform specifically its obligations by putting the Indians in possession of them, the answer is, first, that the record and the history of the country are alike silent as to the motive leading the United States to throw open the Kansas lands, except only as that motive is shown in the history of the border troubles in Kansas; and, secondly, that the United States, having received the consideration for the Kansas lands and having had the use thereof during all the intervening years, is not only in as good position as it would have been by doing what the treaty called for, but is also in fact in a much better condition.

It is confidently submitted, therefore, that the question of estoppel, like that of abandonment, may be eliminated from the case. Reduced to its essence, the alleged conduct of the Indians upon which the Government bases its claims of abandonment and estoppel is this: The treaty of Buffalo Creek, while under negotiation, was met by vigorous objection and protests on the part of certain of the Indians. These protests and objections were the subject of prolonged consideration by the Senate of the United States, and caused a reference of the treaty back to the Indians with amendments, under the supervision of a representative of the Government to explain those amendments and take the sense of the Indians upon the question of acceptance. Notwithstanding that all of the Indians were not satisfied and their hostility to the treaty was not appeased, the treaty-making power of the Government ratified and proclaimed the treaty as the law of the land. Notwithstanding this, some of the Indians continued to complain of the provisions of the treaty requiring them to emigrate on

the call of the President, notably the Senecas, who were not silenced until the treaty of 1842. And the Indians not being required to move themselves did not go west, and the United States, on which the duty of taking the initiative rested, did nothing to put the Indians to the alternative of emigrating or forfeiting all their rights under the treaty. Nothing after the proclaiming of the lands as part of the public domain can cut any figure as to this question, and the monumental fact in respect thereof is that when the lands were ordered surveyed and before they were proclaimed as part of the public domain, the Indians took vigorous action by employing counsel and asserting non-performance by the Government of its obligations, from which course the Indians have never swerved until this day.

Respectfully submitted.

HENRY E. DAVIS,

GUION MILLER,

For the Appellants.

JOSEPH H. CHOATE,

GEORGE BARKER,

JAMES B. JENKINS,

JONAS H. MCGOWAN,

Of Counsel.

APPENDIX.

MENOMONEE TREATY, FEBRUARY 8, 1831 (7 STAT., 342).

Made and Concluded at the City of Washington, this Eighth Day of February, One Thousand Eight Hundred and Thirty-one, Between John H. Eaton, Secretary of War, and Samuel C. Stambaugh, Indian Agent at Green Bay, Specially Authorized by the President of the United States, and the Undersigned Chiefs and Head Men of the Menomonee Nation of Indians, Fully Authorized and Empowered by the said Nation, to Conclude and Settle all Matters Provided for by this Agreement.

The Menomonee tribe of Indians, by their delegates in council, this day, define the boundaries of their country as follows, to wit: On the east side of Green Bay, Fox river, and Winnebago lake; beginning at the south end of Winnebago lake; thence southeasterly to the Milwaukee or Manawauky river; thence down said river to its mouth at Lake Michigan; thence north, along the shore of Lake Michigan, to the mouth of Green Bay; thence up Green Bay, Fox river, and Winnebago lake, to the place of beginning. And on the west side of Fox river as follows: Beginning at the mouth of Fox river, thence down the east shore of Green Bay, and across its mouth, so as to include all the islands of the "Grand Traverse;" thence westerly, on the highlands between the Lake Superior and Green Bay, to the upper forks of the Menomonee river; thence to the Plover portage of the Wisconsin river; thence up the Wisconsin river, to the Soft Maple river; thence to the source of the Soft Maple river; thence west to the Plume river, which falls into the Chippeway river; thence down said Plume river to its mouth; thence down the Chippeway river thirty miles; thence easterly to the forks of the Manoy river, which falls into the Wisconsin river; thence down the said Manoy river to its mouth; thence down the Wisconsin river to the Wisconsin portage; thence across the said portage to the Fox river; thence down Fox river to its mouth at Green Bay, or the place of beginning.

The country described within the above boundaries, the Menomonees claim as the exclusive property of their tribe. Not yet having disposed of any of their lands, they receive no annuities from the United States: whereas their brothers the Pootowottomees on the south, and the Winnebagoes on the west, have sold a great portion of their country, receive large annuities, and are now encroaching upon the lands of the Menomonees. For the purposes, therefore, of establishing the boundaries of their country, and of

ceding certain portions of their lands to the United States, in order to secure great and lasting benefits to themselves and posterity, as well as for the purpose of settling the long-existing dispute between themselves and the several tribes of the New York Indians, who claim to have purchased a portion of their lands, the undersigned, chiefs and head men of the Menomonee tribe, stipulate and agree with the United States, as follows:

First. The Menomonee tribe of Indians declare themselves the friends and allies of the United States, under whose parental care and protection they desire to continue; and although always protesting that they are under no obligation to recognize any claim of the New York Indians to any portion of their country; that they neither sold, nor received any value, for the land claimed by these tribes; yet, at the solicitation of their great father, the President of the United States, and as an evidence of their love and veneration for him, they agree that such part of the land described, being within the following boundaries, as he may direct, may be set apart as a home to the several tribes of the New York Indians, who may remove to, and settle upon the same, within three years from the date of this agreement, viz: Beginning on the west side of Fox river, near the "Little Kackalin," at a point known as the "Old Mill-dam;" thence northwest forty miles; thence northeast to the Oconto creek, falling into Green Bay; thence down said Oconto creek to Green Bay; thence up and along Green Bay and Fox river to the place of beginning; excluding therefrom all private land claims confirmed, and also the following reservation for military purposes: beginning on the Fox river, at the mouth of the first creek above Fort Howard; thence north sixty-four degrees west to Duck creek; thence down said Duck creek to its mouth; thence up and along Green Bay and Fox river to the place of beginning. The Menomonee Indians, also reserve, for the use of the United States, from the country herein designated for the New York Indians, timber and firewood for the United States garrison, and as much land as may be deemed necessary for public highways, to be located by the direction, and at the discretion of the President of the United States. The country hereby ceded to the United States, for the benefit of the New York Indians, contains by estimation about five hundred thousand acres, and includes all their improvements on the west side of Fox river. As it is intended for a home for the several tribes of the New York Indians, who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time, so as not to assign to any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands, and if, at the time of such apportionment, any lands shall remain unoccupied by any tribe of the New York Indians, such portion as would have belonged to said Indians, had it been occupied, shall revert to the United States. That portion, if any, so reverting, to be laid off by

the President of the United States. It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians, are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alterations of tenure, as Congress and the President of the United States shall, from time to time, think proper to adopt.

Second. For the above cession to the United States, for the benefit of the New York Indians, the United States consent to pay the Menomonee Indians, twenty thousand dollars; five thousand to be paid on the first day of August next, and five thousand annually thereafter; which sums shall be applied to the use of the Menomonees, after such manner as the President of the United States may direct.

Third. The Menomonee tribe of Indians, in consideration of the kindness and protection of the Government of the United States, and for the purpose of securing to themselves and posterity, a comfortable home, hereby cede and forever relinquish to the United States, all their country on the southeast side of Winnebago lake, Fox river, and Green Bay, which they describe in the following boundaries, to wit: beginning at the south end of Winnebago lake, and running in a southeast direction to Milwaukee or Manawauky river; thence down said river to its mouth; thence north, along the shore of Lake Michigan, to the entrance of Green Bay; thence up and along Green Bay, Fox river, and Winnebago lake, to the place of beginning; excluding all private land claims which the United States have heretofore confirmed and sanctioned.

It is also agreed that all the islands which lie in Fox river and Green Bay, are likewise ceded; the whole comprising by estimation, two million five hundred thousand acres.

Fourth. The following-described tract of land, at present owned and occupied by the Menomonee Indians, shall be set apart, and designated for their future homes, upon which their improvements as an agricultural people are to be made: beginning on the west side of Fox river, at the "Old Milldam" near the "Little Kackalin," and running up and along said river, to the Winnebago lake; thence along said lake to the mouth of Fox river; thence up Fox river to the Wolf river; thence up Wolf river to a point southwest of the west corner of the tract herein designated for the New York Indians; thence northeast to said west corner; thence southeast to the place of beginning. The above reservation being made to the Menomonee Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes, the President of the United States, as a mark of affection for his children of the Menomonee tribe, will cause to be employed five farmers of established character for capacity, industry, and moral habits, for ten successive years, whose duty it shall be to assist the Menomonee Indians in the cultivation of their farms, and to instruct their children in the business and occupation of farming. Also, five females

shall be employed of like good character, for the purpose of teaching young Menomonee women, in the business of useful housewifery, during a period of ten years.—The annual compensation allowed to the farmers shall not exceed five hundred dollars, and that of the females three hundred dollars. And the United States will cause to be erected, houses suited to their condition, on said lands, as soon as the Indians agree to occupy them, for which ten thousand dollars shall be appropriated; also, houses for the farmers, for which three thousand dollars shall be appropriated, to be expended under the direction of the Secretary of War. Whenever the Menomonees thus settle their land, they shall be supplied with useful household articles, horses, cows, hogs, and sheep, farming utensils, and other articles of husbandry necessary to their comfort, to the value of six thousand dollars; and they desire that some suitable device may be stamped upon such articles, to preserve them from sale or barter, to evil-disposed white persons: none of which, nor any other articles with which the United States may at any time furnish them, shall be liable to sale, or be disposed of or bargained, without permission of the agent. The whole to be under the immediate care of the farmers employed to remain among said Indians, but subject to the general control of the United States Indian agent at Green Bay acting under the Secretary of War. The United States will erect a grist and saw mill on Fox river, for the benefit of the Menomonee Indians, and employ a good miller, subject to the direction of the agent, whose business it shall be to grind the grain, required for the use of the Menomonee Indians, and saw the lumber necessary for building on their lands, as also to instruct such young men of the Menomonee nation, as desire to, and conveniently can be instructed in the trade of a miller. The expenses of erecting such mills, and a house for the miller to reside in, shall not exceed six thousand dollars, and the annual compensation of the miller shall be six hundred dollars, to continue for ten years. And if the mills so erected by the United States, can saw more lumber or grind more grain, than is required for the proper use of said Menomonee Indians, the proceeds of such milling shall be applied to the payment of other expenses occurring in the Green Bay agency, under the direction of the Secretary of War.

In addition to the above provision made for the Menomonee Indians, the President of the United States will cause articles of clothing to be distributed among their tribe at Green Bay, within six months from the date of this agreement, to the amount of eight thousand dollars, and flour and wholesome provisions, to the amount of one thousand dollars, one thousand dollars to be paid in specie. The cost of the transportation of the clothing and provisions, to be included in the sum expended. There shall also be allowed annually thereafter, for the space of twelve successive years, to the Menomonee tribe, in such manner and form as the President of the United States shall deem most beneficial and advantageous to the Indians, the sum of six thousand dollars. As a matter of great

importance to the Menomonees, there shall be one or more gun and blacksmith shops erected, to be supplied with the necessary quantity of iron and steel, which, with a shop at Green Bay, shall be kept up for the use of the tribe, and continued at the discretion of the President of the United States. There shall also be a house for an interpreter to reside in, erected at Green Bay, the expenses not to exceed five hundred dollars.

Fifth. In the treaty of Butte des Mortes, concluded in August 1827, an article is contained, appropriating one thousand five hundred dollars annually, for the support of schools in the Menomonee country. And the representatives of the Menomonee nation, who are parties hereto, require, and it is agreed to, that said appropriation shall be increased five hundred dollars, and continued for ten years from this date, to be placed in the hands of the Secretary at War, in trust for the exclusive use and benefit of the Menomonee tribe of Indians, and to be applied by him to the education of the children of the Menomonee Indians, in such manner as he may deem most advisable.

Sixth. The Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox river and Green Bay, with the same privileges they at present enjoy until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly. The chiefs and warriors of the Menomonee nation, acting under the authority and on behalf of their tribe, solemnly pledge themselves to preserve peace and harmony between their people and the Government of the United States forever. They neither acknowledge the power nor protection of any other State or people. A departure from this pledge by any portion of their tribe, shall be a forfeiture of the protection of the United States Government, and their annuities will cease. In thus declaring their friendship for the United States, however, the Menomonee tribe of Indians, having the most implicit confidence in their Great Father, the President of the United States, desire that he will, as a kind and faithful guardian of their welfare, direct the provisions of this contract to be carried into immediate effect. The Menomonee chiefs request that such part of it as relates to the New York Indians, be immediately submitted to the representatives of their tribes. And if they refuse to accept the provision made for their benefit, and to remove upon the lands set apart for them, on the west side of Fox river, that he will direct their immediate removal from the Menomonee country; but if they agree to accept of the liberal offer made to them by the parties to this compact, then the Menomonee tribe as dutiful children of their great father the President, will take them by the hand as brothers, and settle down with them in peace and friendship.

The boundary, as stated and defined in this agreement, of the Menomonee country, with the exception of the cessions hereinbefore made to the United States, the Menomonees claim as their

country : that part of it adjoining the farming country, on the west side of Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of Government to possess it. The additional annuity then to be paid to the Menomonee tribe, to be fixed by the President of the United States. It is conceded to the United States that they may enjoy the right of making such roads, and of establishing such military posts, in any part of the country now occupied by the Menomonee nation, as the President at any time may think proper.

As a further earnest of the good feeling on the part of their great father, it is agreed that the expenses of the Menomonee delegation to the city of Washington, and of returning will be paid, and that a comfortable suit of clothes will be provided for each ; also, that the United States will cause four thousand dollars to be expended in procuring fowling guns, and ammunition for them ; and likewise, in lieu of any garrison rations, hereafter allowed or received by them, there shall be procured and given to said tribe one thousand dollars' worth of goods and wholesome provisions annually, for four years, by which time it is hoped that their hunting habits may cease, and their attention be turned to the pursuits of agriculture.

In testimony whereof, the respective parties to this agreement have severally signed the same, this 8th February, 1831.

[Here follow the signatures to the treaty.]

Whereas certain articles of agreement were entered into and concluded at the city of Washington, on the eighth day of February instant, between the undersigned, commissioners on behalf of the United States, and the chiefs and warriors, representing the Menomonee tribe of Indians, whereby a portion of the Menomonee country, on the northwest side of Fox river and Green Bay, was ceded to the United States, for the benefit of the New York Indians, upon certain conditions and restrictions therein expressed : And whereas it has been represented to the parties to that agreement, who are parties hereto, that it would be more desirable and satisfactory to some of those interested that one or two immaterial changes be made in the first and sixth articles, so as not to limit the number of acres to one hundred for each soul who may be settled upon the land when the President apportions it, as also to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States.

Now, therefore, as a proof of the sincerity of the professions made by the Menomonee Indians, when they declared themselves anxious to terminate in an amicable manner, their disputes with the New

York Indians, and also as a further proof of their love and veneration for their great father, the President of the United States, the undersigned, representatives of the Menomonee tribe of Indians, unite and agree with the commissioners aforesaid, in making and acknowledging the following supplementary articles a part of their former aforesaid agreement.

First. It is agreed between the undersigned, commissioners on behalf of the United States, and the chiefs and warriors representing the Menomonee tribe of Indians, that, for the reasons above expressed, such parts of the first article of the agreement, entered into between the parties hereto, on the eighth instant, as limits the removal and settlement of the New York Indians upon the lands therein provided for their future homes, to three years, shall be altered and amended, so as to read as follows: That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just. And if, within such reasonable time, as the President of the United States shall prescribe for that purpose, the New York Indians, shall refuse to accept the provisions made for their benefit, or having agreed, shall neglect or refuse to remove from New York, and settle on the said lands, within the time prescribed for that purpose, that then, and in either of these events, the lands aforesaid shall be, and remain the property of the United States, according to said first article, excepting so much thereof, as the President shall deem justly due to such of the New York Indians, as shall actually have removed to, and settled on the said lands.

Second. It is further agreed that the part of the sixth article of the agreement aforesaid, which requires the removal of those of the New York Indians, who may not be settled on the lands at the end of three years, shall be so amended as to leave such removal discretionary with the President of the United States. The Menomonee Indians having full confidence, that, in making his decision, he will take into consideration the welfare and prosperity of their nation.

Done and signed at Washington, this 17th of February, 1831.

[Here follow the signatures.]

(NOTE.—This treaty was ratified with the following proviso contained in the resolution of the Senate:

Provided, That for the purpose of establishing the rights of the New York Indians, on a permanent and just footing, the said treaty shall be ratified with the express understanding that two townships of land on the east side of the Winnebago lake, equal to forty-six thousand and eighty acres shall be laid off, (to commence at some point to be agreed on,) for the use of the Stockbridge and Munsee tribes; and

that the improvements made on the lands now in the possession of the said tribes, on the east side of the Fox river, which said lands are to be relinquished, shall, after being valued by a commissioner to be appointed by the President of the United States, be paid for by the Government: *Provided*, however, That the valuation of such improvements, shall not exceed the sum of twenty-five thousand dollars: and that there shall be one township of land, adjoining the foregoing, equal to twenty-three thousand and forty acres, laid off and granted for the use of the Brothertown Indians, who are to be paid, by the Government the sum of one thousand six hundred dollars for the improvements on the lands now in their possession, on the east side of Fox river, and which lands are to be relinquished by said Indians: Also, that a new line shall be run, parallel to the southwestern boundary line, or course of the tract of five hundred thousand acres described in the first article of this treaty, and set apart for the New York Indians, to commence at a point on the west side of the Fox river, and one mile above the Grand Shute on Fox river, and at a sufficient distance from the said boundary line as established by the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land, on and along the west side of Fox river, without including any of the confirmed private land claims on the Fox river, and which two hundred thousand acres shall be a part of the five hundred thousand acres intended to be set apart for the Six Nations of the New York Indians and the St. Regis tribe; and that an equal quantity to that which is added on the southwestern side shall be taken off from the northeastern side of the said tract, described in that article on the Oconto creek, to be determined by a commissioner, to be appointed by the President of the United States; so that the whole number of acres to be granted to the Six Nations and St. Regis tribe of Indians, shall not exceed the quantity originally stipulated by the treaty.)

WINNEBAGO TREATY, SEPTEMBER 15, 1832 (7 STAT., 370).

Articles of a Treaty Made and Concluded, at Fort Armstrong, Rock Island, Illinois, Between the United States of America, by Their Commissioners, Major General Winfield Scott, of the United States Army, and His Excellency John Reynolds, Governor of the State of Illinois, and the Winnebago Nation of Indians, Represented in General Council by the Undersigned Chiefs, Head Men, and Warriors.

Article I. The Winnebago nation hereby cede to the United States, forever, all the lands, to which said nation have title or claim, lying to the south and east of the Wisconsin river, and the Fox river of Green Bay; bounded as follows, viz: Beginning at the mouth of the Pee-kee-tol a-ka river; thence up Rock river to its source; thence, with a line dividing the Winnebago nation from other Indians east of the Winnebago lake, to the Grande Chute; thence, up Fox river to the Winnebago lake, and with the north-western shore of the said lake, to the inlet of Fox river; thence, up said river to Lake Puckaway, and with the eastern shore of the same to its most southeasterly bend; thence with the line of a purchase made of the Winnebago nation, by the treaty at Prairie du Chene, the first day of August, one thousand eight hundred and twenty-nine to the place of beginning.

Article II. In part consideration of the above cession it is hereby stipulated and agreed, that the United States grant to the Winnebago nation, to be held as other Indians lands are held, that part of the tract of country on the west side of the Mississippi, known, at present, as the Neutral ground, embraced within the following limits, viz: beginning on the west bank of the Mississippi river, twenty miles above the mouth of the Upper Ioway river, where the line of the lands purchased of the Sioux Indians, as described in the third article of the treaty of Prairie du Chien, of the fifteenth day of July, one thousand eight hundred and thirty, begins; thence with said line, as surveyed and marked, to the eastern branch of the Red Cedar creek, thence down said creek, forty miles, in a straight line, but following its windings, to the line of a purchase, made of the Sac and Fox tribes of Indians, as designated in the second article of the before-recited treaty; and thence along the southern line of said last-mentioned purchase, to the Mississippi, at the point marked by the surveyor appointed, by the President of the United States, on the margin of said river; and thence, up said river, to the place of beginning. The exchange of the two tracts of country to take place on or before the first day of June next; that is to say, on or before that day, all the Winnebagoes now residing within the country ceded by them, as above, shall leave the said country, when, and not before, they shall be allowed to enter upon the country granted by the United States, in exchange.

Article III. But, as the country hereby ceded by the Winnebago nation is more extensive and valuable than that given by the United States in exchange; it is further stipulated and agreed, that

the United States pay to the Winnebago nation, annually, for twenty-seven successive years, the first payment to be made in September of the next year, the sum of ten thousand dollars, in specie; which sum shall be paid to the said nation at Prairie du Chien, and Fort Winnebago, in sums proportional to the numbers residing most conveniently to those places respectively.

Article IV. It is further stipulated and agreed, that the United States shall erect a suitable building, or buildings, with a garden and a field attached, somewhere near Fort Crawford, or Prairie du Chien, and establish and maintain therein, for the term of twenty-seven years, a school for the education, including clothing, board, and lodging, of such Winnebago children as may be voluntarily sent to it: the school to be conducted by two or more teachers, male and female, and the said children to be taught reading, writing, arithmetic, gardening, agriculture, carding, spinning, weaving, and sewing, according to their ages and sexes, and such other branches of useful knowledge as the President of the United States may prescribe: *Provided*, That the annual cost of the school shall not exceed the sum of three thousand dollars, And, in order that the said school may be productive of the greatest benefit to the Winnebago nation, it is hereby subjected to the visits and inspections of his Excellency the Governor of the State of Illinois for the time being; the United States, General Superintendents of Indian affairs; of the United States, agents who may be appointed to reside among the Winnebago Indians, and of any officer of the United States Army, who may be of or above the rank of major: *Provided*, That the commanding officer of Fort Crawford shall make such visits and inspections frequently, although of an inferior rank.

Article V. And the United States further agree to make to the said nation of Winnebago Indians the following allowances, for the period of twenty-seven years, in addition to the considerations hereinbefore stipulated; that is to say: for the support of six agriculturists, and the purchase of twelve yokes of oxen, ploughs, and other agricultural implements, a sum not exceeding two thousand five hundred dollars per annum; to the Rock River band of Winnebagoes, one thousand five hundred pounds of tobacco, per annum; for the services and attendance of a physician at Prairie du Chien, and of one at Fort Winnebago, each, two hundred dollars, per annum.

Article VI. It is further agreed that the United States remove and maintain, within the limits prescribed in this treaty, for the occupation of the Winnebagoes, the blacksmith's shop, with the necessary tools, iron and steel, heretofore allowed to the Winnebagoes, on the waters of the Rock river, by the third article of the treaty made with the Winnebago nation, at Prairie du Chien, on the first day of August, one thousand eight hundred and twenty-nine.

Article VII. And it is further stipulated, and agreed by the United States, that there shall be allowed and issued to the Winnebagoes, required by the terms of this treaty to remove within their new limits, soldier's rations of bread and meat, for thirty days:

Provided, That the whole number of such rations shall not exceed sixty thousand.

Article VIII. The United States, at the request of the Winnebago nation of Indians, aforesaid, further agree to pay, to the following-named persons, the sums set opposite their names respectively, viz:

To Joseph Ogee, two hundred and two dollars and fifty cents,

To William Wallace four hundred dollars, and

To John Dougherty, four hundred and eighty dollars: amounting, in all, to one thousand and eighty-two dollars and fifty cents, which sum is in full satisfaction of the claims brought by said persons against said Indians, and by them acknowledged to be justly due.

Article IX. On demand of the United States' commissioners, it is expressly stipulated and agreed, that the Winnebago nation shall promptly seize and deliver up to the commanding officer of some United States military post to be dealt with according to law, the following individual Winnebagoes, viz: Koo-zee-ray-Kaw, Moy-che-nun-Kaw, Tshik-o-ke-maw-Kaw, Ah-hunsee-kaw, and Waw-zee-ree-kay-hee-wee-kaw, who are accused of murdering or of being concerned in the murdering of certain American citizens at or near the Blue mound, in the Territory of Michigan; Nau-saw-nay-he-kaw, and Toag-ra-naw-koo-ray-see-ray-kaw; who are accused of murdering or of being concerned in murdering, one or more American citizens, at or near Killogg's Grove, in the State of Illinois; and also Waw-kee-aun-shaw, and his son, who wounded, in attempting to kill, an American soldier, at or near Lake Kosh-ke-nong, in the said Territory; all of which offences were committed in the course of the past spring and summer. And till these several stipulations are faithfully complied with by the Winnebago nation it is further agreed that the payment of the annuity of ten thousand dollars, secured by this treaty shall be suspended.

Article X. At the special request of the Winnebago nation, the United States agree to grant, by patent, in fee-simple, to the following-named persons, all of whom are Winnebagoes by blood, lands as follows: To Pierre Paquette, three sections; to Pierre Paquette Junior, one section; to Therese Paquette, one section; and to Caroline Harney, one section. The lands to be designated under the direction of the President of the United States, within the country herein ceded by the Winnebago nation.

Article XI. In order to prevent misapprehensions that might disturb peace and friendship between the parties to this treaty, it is expressly understood that no band or party of Winnebagoes shall reside, plant, fish or hunt after the first day of June next, on any portion of the country herein ceded to the United States.

Article XII. This treaty shall be obligatory on the contracting parties, after it shall be ratified by the President and Senate of the United States.

Done at Fort Armstrong, Rock Island, Illinois, this fifteenth day of September one thousand eight hundred and thirty-two.

[Here follow the signatures.]

MENOMONEE TREATY, OCTOBER 27, 1832 (7 STAT., 405).

Whereas articles of agreement between the United States of America, and the Menomonee Indians, were made and concluded at the city of Washington, on the eighth day of February A. D. one thousand eight hundred and thirty-one, by John H. Eaton, and Samuel C. Stambaugh, commissioners on the part of the United States, and certain chiefs and head men of the Menomonee nation, on the part of said nation; to which articles, an additional or supplemental article was afterwards made, on the seventeenth day of February in the same year, by which the said Menomonee nation agree to cede to the United States certain parts of their land; and that a tract of country therein defined shall be set apart for the New York Indians. All which with the many other stipulations therein contained will more fully appear, by reference to the same. Which said agreements thus forming a *Treaty*, were laid before the Senate of the United States during their then session: but were not at said session acted on by that body. Whereupon a further agreement was on the fifteenth day of March, in the same year, entered into for the purpose of preserving the provisions of the treaty, made as aforesaid; by which it was stipulated that the said articles of agreement, concluded as aforesaid, should be laid before the next Senate of the United States, at their ensuing session; and if sanctioned and confirmed by them, that each and every article thereof should be as binding and obligatory upon the parties respectively, as if they had been sanctioned at the previous session. And whereas, the Senate of the United States, by their resolution of the twenty-fifth day of June one thousand eight hundred and thirty-two, did advise and consent to accept, ratify and confirm the same, and every clause and article thereof upon the *conditions* expressed in the proviso, contained in their said resolution: which proviso is as follows: "Provided that for the purpose of establishing the rights of the New York Indians, on a permanent and just footing, the said treaty shall be ratified, with the express understanding that two townships of land on the east side of Winnebago lake equal to forty-six thousand and eighty acres shall be laid off (to commence at some point to be agreed on) for the use of the Stockbridge and Munsee tribes; and that the improvements made on the lands now in the possession of the said tribes on the east side of the Fox river, which said lands are to be relinquished shall, after being valued by a commissioner to be appointed by the President of the United States, be paid for by the Government: Provided, however, that the valuation of such improvements shall not exceed the sum of twenty-five thousand dollars. And that there shall be one township of land adjoining the foregoing, equal to twenty-three thousand and forty acres, laid off and granted for the use of the Brothertown Indians, who are to be paid by the Government, the sum of one thousand six hundred dol-

lars for the improvements on the lands now in their possession, on the east side of Fox river, and which lands are to be relinquished by said Indians: also that a new line shall be run, parallel to the southwestern boundary line or course of the tract of five hundred thousand acres, described in the first article of this treaty, and set apart for the New York Indians, to commence at a point on the west side of the Fox river, and one mile above the Grand Shute, on Fox river, and at a sufficient distance from the said boundary line as established by the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land on and along the west side of Fox river, without including any of the confirmed private land claims on the Fox river; and which two hundred thousand acres shall be a part of the five hundred thousand acres, intended to be set apart for the Six Nations of the New York Indians and the St. Regis tribe; and that an equal quantity to that which is added to the southwestern side shall be taken off from the northeastern side of the said tract described in that article, on the Oconto creek, to be determined by a commissioner to be appointed by the President of the United States; so that the whole number of acres to be granted to the Six Nations, and St. Regis tribe of Indians, shall not exceed the quantity originally stipulated by the treaty." And whereas, before the treaty aforesaid *conditionally* ratified, according to the proviso to the resolution of the Senate above recited, could be obligatory upon the said Menomonee nation, their assent to the same must be had and obtained.

And whereas, the Honorable Lewis Cass, Secretary of the Department of War, by his letter of instructions of the eleventh day of September A. D. 1832, did authorize and request George B. Porter, governor of the Territory of Michigan to proceed to Green Bay, and endeavor to procure the assent of the Menomonees to the change proposed by the Senate, as above set forth; urging the necessity of directing his first efforts to an attempt to procure the unconditional assent of the Menomonees to the said treaty, as ratified by the Senate. But should he fail in this object that he would then endeavor to procure their assent to the best practicable terms, short of those proposed by the Senate; giving them to understand that he merely received such proposition as they might make, with a view to transmit it for the consideration of the President and Senate of the United States. And if this course became necessary that it would be very desirable that the New York Indians should also signify their acceptance of the modifications required by the Menomonees.

And whereas, in pursuance of the said instructions the said George B. Porter proceeded to Green Bay and having assembled all the chiefs and head men of the Menomonee nation, in council, submitted to them, on the twenty-second day of October, A. D. one thousand eight hundred and thirty-two, the said proviso annexed to the resolution aforesaid of the Senate of the United States, for the ratification of the said treaty: and advised and urged on them the

propriety of giving their assent to the same. And the said chiefs and head men having taken time to deliberate and reflect on the proposition so submitted to them and which they had been urged to assent to, did in the most positive and decided manner, refuse to give their assent to the same. (The many reasons assigned for this determination, by them, being reported in the journal of the said commissioner which will be transmitted with this agreement.)

And whereas after failing in the object last stated, the said George B. Porter endeavored to procure the assent of the said chiefs and head men of the Menomonee nation to the best practicable terms short of those proposed by the Senate of the United States; and after much labor and pains, entreaty and persuasion, the said Menomonees consented to the following, as the modifications which they would make; and which are reduced to writing, in the form of an agreement, as the best practicable terms which could be obtained from them, short of those proposed by the Senate of the United States, which they had previously positively refused to accede to. And as the modifications so made and desired have been acceded to by the New York Indians, with a request that the treaty thus modified might be ratified and approved by the President and the Senate of the United States, it is the anxious desire of the Menomonees also, that the treaty, with these alterations may be ratified and approved without delay, that they may receive the benefits and advantage secured to them by the several stipulations of the said treaty, of which they have been so long deprived.

The following is the article of agreement made between the said George B. Porter, commissioner on the part of the United States, specially appointed as aforesaid, and the said Menomonee nation, through their chiefs and head men on the part of their nation.

First. The said chiefs and head men of the Menomonee nation of Indians do not object to any of the matters contained in the proviso annexed to the resolution of the Senate of the United States, so far as the same relate to the granting of three townships of land on the east side of Winnebago lake, to the Stockbridge, Munsee and Brothertown tribes; to the valuation and payment for their improvements, etc. (ending with the words "*and which lands are to be relinquished by said Indians.*") They therefore assent to the same.

Second. The said chiefs and head men of the Menomonee nation of Indians, objecting to all the matters contained in the said proviso annexed to the resolution of the Senate of the United States so far as the same relate to the running of a new line parallel to the southwestern boundary line or course of the tract of five hundred thousand acres, described in the first article of the treaty, and set apart for the New York Indians, to commence at a point on the southwestern side of Fox river, and one mile above the Grand Shute, on Fox river, and at a sufficient distance from the said boundary line, as established by the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land, on and along the west side of the Fox river, without including

any of the confirmed private land claims, on the Fox river, to compose a part of the five hundred thousand acres intended to be set apart for the Six Nations of the New York Indians and St. Regis tribe, agree in lieu of this proposition, to set off a like quantity of two hundred thousand acres as follows: The said Menominee nation hereby agree to cede for the benefit of the New York Indians along the southwestern boundary line of the present five hundred thousand acres described in the first article of the treaty as set apart for the New York Indians, a tract of land; bounded as follows. Beginning on the said treaty line, at the Old Mill dam on Fox river, and thence extending up along Fox river to the little *Rapid Croche*: from thence running a northwest course three miles; thence on a line running parallel with the several courses of Fox river, and three miles distant from the river, until it will intersect a line, running on a northwest course, commencing at a point one mile above the Grand Shute; thence on a line running northwest, so far as will be necessary to include between the said last line and the line described as the southwestern boundary line of the five hundred thousand acres in the treaty aforesaid, the quantity of two hundred thousand acres; and thence running northeast until it will intersect the line, forming the southwestern boundary line aforesaid; and from thence along the said line to the Old Mill dam, or place of beginning, containing two hundred thousand acres. Excepting and reserving therefrom the *privilege* of Charles A. Grignon, for erecting a mill on Apple creek, etc., as approved by the Department of War on the twenty-second day of April one thousand eight hundred and thirty-one and all confirmed private land claims on the Fox river. The lines of the said tract of land so granted to be run, marked and laid off without delay, by a commissioner to be appointed by the President of the United States. And that in exchange for the above, a quantity of land equal to that which is added to the southwestern side shall be taken off from the northeastern side of the said tract, described in that article, on the Oconto creek, to be run, marked and determined, by the commissioner to be appointed by the President of the United States, as aforesaid, so that the whole number of acres to be granted to the Six Nations and St. Regis tribe of Indians, shall not exceed the quantity of five hundred thousand acres.

Third. The said chiefs and head men of the Menominee nation agree, that in case the said original treaty, made as aforesaid, and the supplemental articles thereto, be ratified and confirmed at the ensuing session of the Senate of the United States with the modifications contained in this agreement, that each and every article thereof shall be as binding and obligatory upon the parties respectively, as if they had been sanctioned at the times originally agreed upon.

In consideration of the above voluntary sacrifices of their interest, made by the said Menominee nation and as evidence of the good feeling of their great father, the President of the United States, the said George B. Porter, commissioner as aforesaid, has delivered to

the said chiefs, head men and the people of the said Menominee nation, here assembled, presents in clothing to the amount of one thousand dollars : five hundred bushels of corn, ten barrels of pork, and ten barrels of flour, &c., &c.

In witness whereof, we have hereunto set our hands and seals, at the agency-house, at Green Bay, this twenty-seventh day of October in the year of our Lord one thousand eight hundred and thirty-two.

[Here follow the signatures.]

Appendix.

To all to whom these presents shall come, the undersigned, chiefs and head men of the sundry tribes of New York Indians (as set forth in the specifications annexed to their signatures), send greeting :

Whereas a tedious, perplexing and harassing dispute and controversy have long existed between the Menominee nation of Indians and the New York Indians, more particularly known as the Stockbridge, Munsee and Brothertown tribes, the Six Nations and St. Regis tribe. The treaty made between the said Menominee nation and the United States, and the conditional ratification thereof by the Senate of the United States, being stated and set forth in the within agreement, entered into between the chiefs and head men of the said Menominees, and George B. Porter, governor of Michigan, commissioner specially appointed, with instructions referred to in the said agreement. And whereas the undersigned, are satisfied and believe that the best efforts of the said commissioner were directed and used to procure, if practicable, the unconditional assent of the said Menominees to the change proposed by the Senate of the United States in the ratification of the said treaty : but without success. And whereas the undersigned further believe that the terms stated in the within agreement are the best practicable terms, short of those proposed by the Senate of the United States, which could be obtained from the said Menominees ; and being asked to signify our acceptance of the modifications proposed as aforesaid by the Menominees we are compelled by a sense of duty and propriety to say that we do hereby accept of the same. So far as the tribes to which we belong are concerned, we are perfectly satisfied, that the treaty should be ratified on the terms proposed by the Menominees. We further believe that the tract of land which the Menominees in the within agreement, are willing to cede, in exchange for an equal quantity on the northeast side of the tract of five hundred thousand acres, contains a sufficient quantity of good land, favorably and advantageously situated to answer all the wants of the New York Indians, and St. Regis tribe. For the purpose, then, of putting an end to strife, and that we may

all sit down in peace and harmony, we thus signify our acceptance of the modifications proposed by the Menomonees: and we most respectfully request that the treaty as now modified by the agreement this day entered into with the Menomonees, may be ratified and approved by the President and Senate of the United States.

In witness whereof, we have hereunto set our hands and seals at the agency-house at Green Bay, this twenty-seventh day of October in the year of our Lord one thousand eight hundred and thirty-two.

[Here follow the signatures.]

TREATY OF BUFFALO CREEK, JANUARY 15, 1838 (7 Stat., 550).

As amended by the Senate and assented to by the several tribes,
1838.

*Treaty with the New York Indians, as Amended by the Senate of the
United States, June 11, 1838.*

*Articles of a Treaty Made and Concluded at Buffalo Creek, in the State
of New York, the Fifteenth Day of January, in the Year of our Lord
One Thousand Eight Hundred and Thirty-eight, by Ransom H. Gil-
let, a Commissioner on the Part of the United States, and the Chiefs,
Head Men, and Warriors of the Several Tribes of New York Indians
Assembled in Council, Witnesseth :*

Whereas, the Six Nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interests must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six Nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case, remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonic and Winnebago Indians, of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonic Indians, concluded in February, 1831, to which the New York Indians gave their assent on the 17th day of October, 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe. And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favor of emigration, preferred to remove at once to the Indian Territory,

which they were fully persuaded was the only permanent and peaceable home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian Territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian Territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay :

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

General Provisions.

Article 1. The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonic treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside : beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox river ; from thence on said parallel line, northwardly six miles ; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

Article 2. In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit : Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands ; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands

to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee-simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above-described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them according to their respective numbers, as mentioned in a schedule hereunto annexed.

Article 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

Article 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

Article 5. The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

Article 6. It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as

shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

Article 7. It is expressly understood and agreed that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

Article 8. It is stipulated and agreed that the accounts of the commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

Special Provisions for the St. Regis.

Article 9. It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for moneys laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be apportioned out to the several claimants by the chiefs of the said party and a United States commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazer Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee-simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox river, thirteen chains above the Old Milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east, two hundred chains; thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

Special Provisions for the Senecas.

Article 10. It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians and to extend so far west, as to include one half section (three hundred and twenty acres) of land for each soul of the

Senecas, Cayugas and Onondagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States commissioner, appointed by the United States to hold said treaty or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said appraisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

Special Provisions for the Cayugas.

Article 11. The United States will set apart for the Cayugas, on their removing to their new homes at the West, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

Special Provisions for the Onondagas Residing on the Seneca Reservations.

Article 12. The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing West, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said

Onondagas, on their removal to their new homes in the West, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

Special Provisions for the Oneidas Residing in the State of New York.

Article 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian Territory, as soon as they can make satisfactory arrangements with the governor of the State of New York for the purchase of their lands at Oneida.

Special Provisions for the Tuscaroras.

Article 14. The Tuscarora nation agree to accept the country set apart for them in the Indian Territory, and to remove there within five years, and to continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns in fee-simple, five thousand acres of land, lying in Niagara county in the State of New York, which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the president to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant, and William Chew, or the survivor or survivors of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

Article 15. The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

[Here follow signatures.]

SCHEDULE A.

Census of the New York Indians as Taken in 1837—Number Residing on the Seneca Reservations.

Senecas.....	2,309
Onondagas.....	194
Cayugas.....	130
	<hr/>
	2,633
Onondagas, at Onondaga.....	300
Tuscaroras	273
St. Regis, in New York.....	350
Oneidas, at Green Bay.....	600
Oneidas, in New York.....	620
Stockbridges	217
Munsees.....	132
Brothertowns.....	360

The above was made before the execution of the treaty.

R. H. GILLET,
Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty :

To Jonothan Printess, ninety-three dollars.

To William Chew, one hundred and fifteen dollars.

To John Patterson, forty-six dollars.

To William Mountpleasant, one hundred and seventy-one dollars.

To James Cusick, one hundred and twenty-five dollars.

To David Peter, fifty dollars.

The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.

R. H. GILLET,
Commissioner.

SCHEDULE C.

Schedule Applicable to the Onondagas and Cayugas Residing on the Seneca Reservations.

It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, anything therein to the contrary notwithstanding :

To William King, one thousand five hundred dollars.

To Joseph Isaacs, seven hundred dollars.

To Jack Wheelbarrow, three hundred dollars.

To Silversmith, one thousand dollars.

To William Jacket, five hundred dollars.

To Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.

R. H. GILLET,
Commissioner.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation : Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massa-

chusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration or purchase-money for such sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract or parcel of land, situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract or parcel of land situate, lying, and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and

every of the said tracts or parcels of land belonging or appertaining ; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof ; to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof forever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

[Here follow signatures.]

Signed, sealed and delivered in presence of—

[Here follow signatures.]

At the beforementioned treaty, held in my presence as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument of writing was agreed to by the contracting parties therein named, and was in my presence executed by them, and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January in the year 1838.

JOSIAH TROWBRIDGE.

I have attended a treaty of the Seneca nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the 15th day of January in the year of our Lord one thousand eight hundred and thirty-eight when the within instrument was duly executed, in my presence, by the chiefs of the Seneca nations, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. GILLET,
Commissioner.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva in the county of Ontario on the other part, concerning the purchase

of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in and to the tract, piece or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration, or purchase-money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that tract or parcel of land, situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges hereditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof forever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to

remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

[Here follow signatures.]

Sealed and delivered in the presence of—

[Here follow signatures.]

At the above-mentioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. TROWBRIDGE,
Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned, and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. GILLET,
Commissioner.

Supplemental Article

To the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January, 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February, 1838.

Supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, dated January 15, 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on the part of the United States, and he having fully

and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States, and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians, who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provision for the St. Regis Indians, anything in the article contained to the contrary notwithstanding.

Done at the council-house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight.

Witness our hands and seals.

[Here follow signatures.]

The foregoing was executed in our presence :

[Here follow signatures.]

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June, 1838, and to our contract therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28, 1838.

[Here follow signatures.]

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. GILLET,
Commissioner.

Witness :

[Here follow signatures.]

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been sub

mitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 9th, 1838 at the Oneida council-house.

Executed in the presence of—

TIMOTHY JENKINS.

The above assent was voluntarily, freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. GILLET.

Commissioner, Etc.

We the undersigned sachems chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 14th, 1838.

[Here follow signatures.]

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. GILLET,

Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 30th, 1838.

[Here follow signatures.]

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

The St. Regis Indians shall not be compelled to remove under the treaty or amendments.

Dated October 9th, 1838.

[Here follow signatures.]

The foregoing assent was signed in our presence :

R. H. GILLET,
Commissioner.

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June, 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 31st, 1838.

[Here follow signatures.]

The above signatures were freely given in our presence :

[Here follow signatures.]

SENECA TREATY, MAY 20, 1842 (7th Stats., 586).

Made and Concluded at Buffalo Creek, in the State of New York, on the Twentieth Day of May, in the Year One Thousand Eight Hundred and Forty-two, Between the United States of America, Acting Herein by Ambrose Spencer, Their Commissioner, Thereto Duly Authorized, on the One Part, and the Chiefs, Head Men, and Warriors of the Seneca Nation of Indians, Duly Assembled in Council, on the Other Part.

Whereas a treaty was heretofore concluded, and made between the said United States, and the chiefs, head men, and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight, which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas on the day of making this treaty, and bearing even date herewith, a certain indenture was made executed and concluded by and between the said Seneca nation of Indians, and Thomas L. Ogden, and Joseph Fellows, assignees under the State of Massachusetts, in the presence and with the approbation of a commissioner appointed by the United States, and in the presence and with the approbation of Samuel Hoare, a superintendent on the part of the Commonwealth of Massachusetts, which indenture is in the words and figures following, to wit :

" This indenture made and concluded between Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario of the one part, and the chiefs and head men of the Seneca nation of Indians, on the other part at a council duly assembled and held at Buffalo Creek, in the State of New York on the twentieth day of May in the year one thousand eight hundred and forty-two in the presence of Samuel Hoare, the superintendent thereto authorized and appointed by and on the part of the Commonwealth of Massachusetts, and of Ambrose Spencer a commissioner thereto duly appointed and authorized on the part of the United States.

" Whereas at a council held at Buffalo Creek on the fifteenth day of January in the year one thousand eight hundred and thirty-eight, an indenture of that date was made and executed by and between the parties to this agreement, whereby the chiefs and head men of the Seneca nation of Indians for the consideration of two hundred and two thousand dollars did grant, bargain, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, all those four several tracts of land, situate within the State of New York then and yet occupied by the said nation, or the people thereof,

severally described in the said indenture, as the Buffalo Creek reservation, containing by estimation forty-nine thousand nine hundred and twenty acres of land, the Cattaraugus reservation containing by estimation twenty-one thousand six hundred and eighty acres of land, the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres of land, and the Tonnewanda reservation containing by estimation twelve thousand eight hundred acres of land; a duplicate of which indenture was annexed to a treaty of the same date made between the United States of America and the chiefs, head men, and warriors of the several tribes of the New York Indians assembled in council; which treaty was amended and proclaimed by the President of the United States on the fourth of April one thousand eight hundred and forty, as having been duly ratified; as by the said indenture, treaty and proclamation more fully appear.

"And whereas divers questions and differences having arisen between the chiefs and head men of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture, and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties have mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

"Now therefore it is hereby mutually declared, and agreed, by and between the said parties as follows

"Article first. The said Thomas Ludlow Ogden, and Joseph Fellows in consideration of the release and agreements hereinafter contained on the part of the said Seneca nation do on their part consent, covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus reservation, and the Allegany reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land.

"Article second. The chiefs and head men of the Seneca nation of Indians in consideration of the foregoing, and of the agreement next hereinafter contained, do on their part grant, release and confirm unto the said Thomas Ludlow Ogden, and Joseph Fellows, and to their heirs and assigns, in joint tenancy, the whole of the said two tracts of land severally called the Buffalo Creek reservation, and the Tonnewanda reservation, and all the right and interest therein of the said nation.

"Article third. It is mutually agreed, between the parties hereto that in lieu of the sum expressed in the said indenture, as the consideration of the sale, and release of the said four tracts of land, there shall be paid to the said nation a just consideration sum, for

the release of the two tracts, hereby confirmed to the said Ogden and Fellows, to be estimated and ascertained as follows

"The present value of the Indian title to the whole of the said four tracts of land including the improvements thereon, shall for all the purposes of this present compact, be deemed and taken to be two hundred and two thousand dollars, of which sum one hundred thousand dollars shall be deemed to be the value of such title in and to all the lands within the said four tracts exclusive of the improvements thereon and one hundred and two thousand dollars to be the value of all the improvements within the said four tracts, and of the said sum of one hundred thousand dollars the said Ogden and Fellows shall pay to the Seneca nation such proportion as the value of all the lands within the said two tracts called the Buffalo Creek, and Tonnewanda reservations shall bear to the value of all the lands within all the said four tracts—and of the said sum of one hundred and two thousand dollars, the said Ogden and Fellows shall pay such proportion as the value of the improvements on the same two tracts, shall bear to the value of the improvements on all the said four tracts.

"Article fourth. The amount of the consideration monies to be paid in pursuance of the last preceding article shall be determined by the judgment and award of arbitrators, one of whom shall be named by the Secretary of the War Department of the United States, and one by the said Ogden and Fellows, which arbitrators in order to such judgment and award, and to the performance of the other duties hereby imposed on them, may employ suitable surveyors to explore examine and report on the value of the said lands and improvements, and also to ascertain the contents of each of the said four tracts, which contents shall govern the arbitrators as to quantity in determining the amount of the said consideration money.

"The same arbitrators shall also award and determine the amount to be paid to each individual Indian out of the sum which on the principles above stated, they shall ascertain and award to be the proportionate value of the improvements on the said two tracts called the Buffalo Creek reservation and the Tonnewanda reservation, and in case the said arbitrators shall disagree as to any of the matters hereby submitted to them, they may choose an umpire whose decision thereon shall be final and conclusive, and the said arbitrators shall make a report in writing of their proceedings in duplicate, such reports to be acknowledged or proved according to the laws of the State of New York, in order to their being recorded, one of such reports to be filed in the office of the Secretary of the Department of War, and the other thereof to be delivered to the said Thomas L. Ogden and Joseph Fellows.

"Article fifth. It is agreed, that the possession of the two parts hereby confirmed, to the said Ogden and Fellows, shall be surrendered and delivered up to them, as follows, viz: The forest or unimproved lands on the said tracts, within one month after the

report of the said arbitrators shall be filed, in the office of the Department of War, and the improved lands within the two years after the said report shall have been so filed; Provided always that the amount to be so ascertained and awarded, as the proportionate value of the said improvements shall on the surrender thereof be paid to the President of the United States, to be distributed among the owners of the said improvements, according to the determination and award of the said arbitrators, in this behalf, and provided further that the consideration for the release and conveyance of the said lands shall at the time of the surrender thereof be paid or secured to the satisfaction of the said Secretary of the War Department, the income of which is to be paid to the said Seneca Indians annually.

"But any Indian having improvements may surrender the same, and the land occupied by him and his family at any time prior to the expiration of the said two years, upon the amount awarded to him for such improvements being paid to the President of the United States, or any agent designated by him for that purpose by the said Ogden and Fellows, which amount shall be paid over to the Indian entitled to the same, under the direction of the War Department.

"Article sixth. It is hereby agreed and declared, to be the understanding and intent of the parties hereto that such of the said Seneca nation, as shall remove from the State of New York, under the provisions of any treaty, made or to be made, between the United States and the said Indians, shall be entitled in proportion to their relative numbers to the funds of the Seneca nation, and that the interest and income of such their share and proportion of the said funds, including the consideration money to be paid to the said nation in pursuance of this Indenture, and of all annuities belonging to the said nation shall be paid to the said Indians so removing at their new homes, and whenever the said tracts called the Allegany and the Cattaraugus reservations, or any part thereof shall be sold and conveyed by the Indians remaining in the State of New York, the Indians so removing shall be entitled to share in the proceeds of said sales in the like proportion. And it is further agreed and declared, that such Indians owning improvements in the Cattaraugus and Allegany tracts as may so remove from the State of New York, shall be entitled on such removal, and on surrendering their improvements to the Seneca nation, for the benefit of the nation to receive the like compensation for the same according to their relative values as in the third and fourth articles of this treaty are stipulated to be paid, to the owners of improvements in the Buffalo Creek and Tonnewanda tracts on surrendering their improvements; which compensations may be advanced by the President of the United States, out of any funds in the hands of the Government of the United States, belonging to the Seneca nation, and the value of these improvements shall be ascertained and

reported by the arbitrators to be appointed in pursuance of the fourth article.

"Article seventh. This Indenture is to be deemed to be in lieu of, and as a substitute for the above-recited Indenture made and dated the fifteenth day of January, one thousand eight hundred and thirty-eight, so far as the provisions of the two instruments may be inconsistent, or contradictory, and the said Indenture so far as the same may be inconsistent with the provisions of this compact, is to be regarded and is hereby declared to be rescinded and released.

"Article eighth. All the expenses attending the execution of this indenture and compact including those of the arbitration and surveys hereinbefore referred to, and also those of holding the treaty now in negotiation between the United States and the said Seneca nation, except so far as may be provided for by the United States, shall be advanced and paid by the said Ogden and Fellows.

"Article ninth. The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

"In witness whereof the parties to these presents have hereunto, and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written."

Therefore taking into consideration the premises it is agreed and stipulated by and between the United States of America and the Seneca nation of Indians, as follows, to wit:

First. The United States of America consent to the several articles and stipulations contained in the last-recited Indenture between the said nation and the said Thomas Ludlow Ogden and Joseph Fellows, above set forth.

Second. The United States further consent and agree that any number of the said nation, who shall remove from the State of New York, under the provisions of the above-mentioned treaty proclaimed as aforesaid, on the fourth day of April one thousand eight hundred and forty shall be entitled in proportion to their relative numbers to all the benefits of the said treaty.

Third. The United States of America further consent and agree, that the tenth article of said treaty proclaimed as aforesaid on the fourth day of April one thousand eight hundred and forty, be deemed, and considered as modified, in conformity with the provisions of the indenture hereinabove set forth, so far as that the

United States will receive and pay the sum stipulated to be paid as the consideration money of the improvements therein specified, and will receive hold and apply the sum to be paid, or the securities to be given for the lands therein mentioned, as provided for in such indenture.

In testimony whereof the undersigned Ambrose Spencer commissioner on the part of the United States of America, and the undersigned chiefs and head men of the Seneca nation of Indians, have to two parts of this treaty, one thereof to remain with the United States, and the other thereof with the Seneca nation of Indians, set their hands and affixed their seals the day and year first above mentioned.

[Here follow signatures.]

52D CONGRESS, }
1st Session. {

SENATE.

{ MIS. Doc.
{ No. 46.

IN THE SENATE OF THE UNITED STATES.

JANUARY 18, 1892.—Referred to the Committee on Appropriations and ordered to be printed.

Findings Filed by the Court of Claims in the Case of the New York Indians vs. The United States.

[The New York Indians, being those Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, *vs.* The United States. Congressional case, No. 151.]

COURT OF CLAIMS, CLERK'S OFFICE,
WASHINGTON, January 16, 1892.

SIR: Pursuant to the order of the court I transmit herewith a certified copy of the findings filed by the court in the aforesaid cause, which case was referred to this court by the Committee on Indian Affairs, United States Senate, under the act of March 3, 1883.

I am, very respectfully, yours, etc.,

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

HON. LEVI P. MORTON,
President of the Senate of the United States.

[Court of Claims. Congressional case No. 151. The New York Indians, being those Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th day of January, 1838, *vs.* The United States.]

At a Court of Claims held in the city of Washington on the 11th day of January, A. D. 1892, the court filed the following findings of fact, to wit:

The claim or matter in the above-entitled case was transmitted to the court by the Committee on Indian Affairs of the Senate of the United States, the 21st day of June, 1884.

James B. Jenkins, Henry E. Davis, Guion Miller, Esqs. (with whom was George Barker, Esq.), appeared for claimants, and the Attorney General, by F. P. Dewees, Esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The following is the letter transmitting the cause to this court:

UNITED STATES SENATE COMMITTEE ON CLAIMS,
June 21, 1884.

At a meeting of the Committee on Indian Affairs of the Senate of the United States the following order was made by that committee:

Ordered, That Senate bill (S. 467) to provide for a settlement with the Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th day of January, 1838, for the unexecuted stipulation of that treaty, together with the accompanying amendment intended to be proposed by Mr. Voorhees to the aforesaid bill, which bill and proposed amendment were referred to said committee at the first session of the Forty-eighth Congress, and which bill and proposed amendment are now pending before said committee, be transmitted (in accordance with the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," approved March 3, 1883), to the Court of Claims of the United States, together with the vouchers, papers, proofs, and documents appertaining thereto, for the investigation and determination of the facts involved in said bill and said proposed amendment thereto.

J. R. McCARTY,

Clerk to the United States Senate Committee on Indian Affairs.

All questions relative to the proposed amendment to the Senate bill mentioned in said letter were abandoned by counsel at the beginning of the argument, and it was stated that an agreement had been reached upon its subject-matter.

The case having been brought to a hearing on the 25th day of November, 1891, the court, upon the evidence and after considering the briefs and arguments of counsel on both sides, find the facts to be as follows:

I.

In 1784 the United States by treaty secured the Oneida and Tuscarora nations in the possession of the lands upon which they were settled, and fixed the boundaries of the lands of the Six Nations, it being agreed by the United States that the Six Nations should be secured in the peaceful possession of the lands they then inhabited east and north of the boundaries fixed.

The stipulations of this treaty were renewed and confirmed in 1789 when the boundary was again described in the same terms as in the treaty of 1784 and the Indians relinquished and ceded to the United States the lands west of the defined boundary. The Mohawks were not parties to the treaty of 1789.

In 1794 another treaty was concluded with the Six Nations guaranteeing peace and friendship perpetual between the parties acknowledging the lands reserved to the Oneida, Onondaga, and Cayuga nations in their treaty with the State of New York to be their prop-

erty, and engaging that the United States would never claim the same or disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof, but the said lands should remain theirs until they chose to sell the same to the United States, who "have the right to purchase." The land of the Seneca nation is also described by metes and bounds in this treaty acknowledged as their property and confirmed as theirs until they chose to sell to the United States, who "have the right to purchase," and the United States having thus described and acknowledged the lands of the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same nor disturb the Six Nations in the free use and enjoyment thereof, the Six Nations upon their side engaged never to claim any other lands within the boundaries of the United States.

II.

The New York Indians in 1810 petitioned the President of the United States for leave to purchase reservations of their western brethren with the privilege of removing to and occupying the same. Thereupon, with the approbation of the President, land situated at Green Bay, Wisconsin, was purchased by the said New York Indians from the Menomonee and Winnebago tribes.

III.

In 1821 the Menomonee Indians ceded to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations two large tracts of land in Wisconsin for a small money consideration. The title to one of those tracts was confirmed in the New York Indians by the President March 13, 1823.

IV.

Thereafter certain New York Indians belonging to the Oneida, St. Regis, Munsee, and Brothertown tribes removed to and took possession of the lands in Wisconsin. Subsequently questions of tenure and boundaries of the lands granted to the New York Indians were raised by the Menomonees, negotiations were had, and steps were taken through which the purchase by the New York Indians from the Menomonees and Winnebagoes was so reduced as to include only 500,000 acres of land on the south and west of the Fox river, together with three townships on the north and east of said river, comprising 89,120 acres, which was to be set apart for the Stockbridge, Munsee, and Brothertown tribes, to all of which the New York Indians duly assented, and thereafter the title to the said three townships and the said 500,000 acres was recognized by the Congress and the President of the United States to be in the New York Indians. In the treaty of February 8, 1831, with the Menomonee Indians it was agreed that certain land in Wisconsin

might be set apart as a home to the several tribes "of New York Indians who may remove to and settle upon the same within three years from the date of this agreement."

This treaty was assented to by the New York Indians, October 17, 1832, and by amendment later introduced by agreement between the United States and the Menomonee Indians, the removal of those of the New York Indians who might not be settled on the lands at the end of three years was left discretionary with the President of the United States. A small portion of the New York Indians removed to the Wisconsin or Green Bay lands.

In the treaty with the Menomonees, *supra*, appears at the end of article 1 the following:

"It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

V.

The title of the New York Indians as set forth in the fourth finding has since been acknowledged by the United States; as in the treaty with the Menomonees of September 3, 1836; in the treaty with the Stockbridges and Munsees, of September 3, 1839; in the treaty with the New York Indians concluded at Buffalo Creek January 15, 1838; and in the treaty with the Tonawanda band of Senecas of November 5, 1857.

VI.

From the preceding findings it appears as a fact that prior to February, 1831, the claimants, with the approbation of the President, had purchased from the Menomonee and Winnebago Indians certain lands near Green Bay, in the then Territory of Wisconsin; that a question had arisen as to the extent of this purchase, which was finally settled by treaty between the Menomonees and the United States in February, 1831 (ratified in 1832), which treaty contained a provision securing to claimants, in consideration of \$20,000, 500,000 acres of land at Green Bay (in addition to the townships set apart for the Stockbridge, Munsee, and Brothertown tribes), on condition that they should remove to the same within three years or such reasonable time as the President of the United States should prescribe.

VII.

In January, 1838, the claimants had not all removed to the lands in Wisconsin, but had been prevented from doing so by reasons accepted as sufficient by the President of the United States.

VIII.

Prior to the month of January, 1838, the claimants applied to the President of the United States to take their Green Bay lands and provide them a new home in the Indian Territory. Pursuing the Government policy in removing the Indians to the west of the Mississippi, the President acted upon the application of the Indians by making with them the treaty (known as the treaty of Buffalo Creek) of January 15, 1838.

IX.

The treaty of Buffalo Creek provided, in consideration of the premises recited in the foregoing three findings and of the covenants contained in the treaty itself to be performed by the United States, that the claimants cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First, to set apart as a permanent home for all of the claimants *having no permanent homes* a certain tract of country west of the Mississippi river, described by metes and bounds and to include 1,824,000 acres of land; to have and to hold the same in fee-simple to the said tribes or nations of Indians by patent from the President of the United States, in conformity to the provisions of section 3 of the act of Congress of May 28, 1830, entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" the same to be divided among the different tribes, nations, or bands in severalty; it being understood that the said country was intended as a future home for the following tribes: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, and was to be divided equally among them according to the number of individuals in each tribe, as set forth in a schedule annexed to the treaty and designated as Schedule A, on condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. The following is the Schedule A:

Census of the New York Indians as Taken in 1837.

Number residing on the Seneca reservations:

Senecas.....	2,309
Onondagas.....	194
Cayugas.....	130
	<hr/>
	2,633

Onondagas, at Onondaga	300
Tuscaroras	273
St. Regis in New York	350
Oneidas at Green Bay	600
Oneidas in New York	620
Stockbridges	217
Munsees	132
Brothertowns	360

Second. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes, and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of the claimants hereinafter mentioned, on their removal west, the following sums, respectively, namely: To the St. Regis tribe, \$5,000; to the Seneca nation, the income, annually, of \$100,000 (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, \$2,500 cash and the annual income of \$2,500; to the Onondagas, \$2,000 cash and the annual income of \$2,500; to the Oneidas, \$6,000 cash and to the Tuscaroras, \$3,000.

Fifth. The United States agreed to appropriate the sum of \$400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts. It does not appear that application was made by the tribes or bands or any of them to the Government for removal to the Kansas lands, except as appears in finding XV below. Article 3 of this treaty of Buffalo Creek provides that such of the tribes of the New York Indians as did not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President might appoint, should forfeit to the United States all interest in the lands so set apart. By supplemental article the St. Regis Indians assented to the treaty with this stipulation, viz:

And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the "said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove."

The treaty of January 15, 1838, as amended by the Senate June 11, 1838, was assented to September 28, 1838, by the Seneca tribe of New York Indians; August 9, 1838, by chiefs of the Oneida tribe; August 14, 1838, by the Tuscarora nation residing in New York; August 30, 1838, by Cayuga Indians residing in New York; October 9, 1838, by the St. Regis Indians residing in New York; August 31, 1838, by the Onondaga tribe of Indians on the Seneca reservations in the State of New York.

There is no evidence before the court that the Onondagas at Onondaga (300), Oneidas at Green Bay (600), Stockbridges (217), Munsees (132), Brothertowns (360), ever assented to the treaty as amended by the Senate June 11, 1838.

X.

In the year 1838, at the time of the making of the treaty of Buffalo Creek, the Six Nations of New York Indians, designated by that name in the treaty, consisted of six separate nations or tribes known and named as the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras, and the St. Regis; and each of said nations or tribes, except the Cayugas, owned and possessed a reservation of land in the State of New York on which the members of said tribes resided and the right to occupancy to which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca nation with the consent of the latter.

XI.

The lands occupied by the Seneca nation in the State of New York, as set forth in the last preceding finding, consisted of four separate and distinct reservations, namely:

The Buffalo Creek reservation in Erie county, containing 49,920 acres; the Cattaraugus Creek reservation, containing 21,680 acres; the Allegany reservation, containing 30,469 acres, and the Tonawanda reservation, in Genesee county, containing 12,800 acres. The lands occupied by the Tuscarora Indians were situated in Niagara county, N. Y., and comprised 6,249 acres. The lands occupied by the Onondaga tribe were situated in Onondaga county, N. Y., and comprised 7,300 acres. The lands occupied by the Oneida tribe were situated in Oneida and Madison counties, N. Y., and comprised 400 acres. The reservation and lands occupied by the St. Regis tribe, were situated in Franklin county, N. Y., and comprised about 14,000 acres.

XII.

For many years prior to the making of the treaty of Buffalo Creek in 1838, the said several nations or tribes of Indians had im-

proved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

XIII.

At the time of the making of the treaty of Buffalo Creek in 1838, one Thomas L. Ogden and one Joseph Fellows, both residents of the State of New York, claimed to be the assignees of the State of Massachusetts and owners of the pre-emptive right of purchase from the Seneca nation of the several reservations of land occupied by them as above set forth, which pre-emptive right had been secured to the Commonwealth of Massachusetts by a convention of the States of New York and Massachusetts, held on the 6th day of December, 1786. The claims of the said Ogden and Fellows were recognized and provided for in the said treaty of Buffalo Creek and the treaty supplementary thereto, which was entered into between the United States and the said Six Nations on the 20th day of May, 1842. After the ratification of said treaty of 1842, which was proclaimed on the 26th day of August in that year, the Seneca nation surrendered to said Ogden and Fellows the possession of the Buffalo Creek reservation aforesaid, and the said nation has since continued to occupy the Cattaraugus and Allegany reservations mentioned in said treaties of 1838 and 1842.

XIV.

The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek.

XV.

No provision of any kind was ever made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and of this number only 32 ever received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in conformity with such desire said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of \$9,464.08 of amount appropriated by Congress was expended in the removal of a party of New York Indians under his direction in 1846.

From Hogeboom's muster-roll in the Indian Office it appears that 271 were mustered for emigration. The roll shows that of this

number 73 did not leave New York with the party; the number, thus reduced to 191, arrived in Kansas June 15, 1846; 17 other Indians arrived subsequently; 62 died, and 17 returned to New York.

It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas.

XVI.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

XVII.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek were, afterwards, surveyed and made part of the public domain, and were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of the said lands as were sold was at the rate of \$1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about \$1.22 per acre.

XVIII.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of the release by the said band of its claims upon the United States to the lands west of the State of Missouri, all right and claim to be removed thither and for support and assistance after removal and all other claims against the United States under the treaties of 1838 and 1842 (reserving their rights to moneys paid or payable by Ogden and Fellows), agreed to pay and invest, and did pay and invest, for said band the sum of \$256,000. This amounted in substance to compensating the beneficiaries of the treaty of 1838 at the rate of \$1 per acre for their claims to lands in Kansas, under said treaty, and also their proportionate share of the \$400,000 provided to be appropriated in that treaty.

XIX.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian reserve should be surveyed with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the

residue was to become public domain. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860) the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting in the powers of attorney that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof; the said Indians have steadily since asserted their said claims.

XX.

Of the sum of \$400,000 agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes mentioned in the ninth finding above, only the sum of \$20,477.50 was so appropriated (except as hereinafter stated). Of this sum only \$9,464.08 was actually expended: this sum was expended for the removal, more than five years after the ratification of the treaty, of some of the 260 individuals mentioned in the fifteenth finding above; but in addition to said sum of \$9,464.08 there was paid for the Tonawanda band of Senecas \$256,000, as mentioned in the eighteenth finding above.

XXI.

The records of the Indian Office do not show that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of the New York Indians from Wisconsin and New York to the Kansas lands under the treaty of Buffalo Creek (January 15, 1838), or that the Government took any steps to defend those Indians who did remove to Kansas "in the peaceable possession of their new homes."

XXII.

The account under the treaty of Buffalo Creek may thus be stated (omitting all questions of law and as to interest and without deciding that the United States are or are not responsible for any portion thereof):

Credit the tribes with—

1,824,000 acres of land in Kansas, at \$1 per acre. . . .	\$1,824,000 00
Amount named in articles 9 to 14, both inclusive, of the treaty of Buffalo Creek (except the \$100,000 for the Seneca nation, which has been taken into the account in other dealings between the United States and that nation respecting the claims of Ogden and Fellows).	23,000 00
Amount named in article 15 of the treaty.	400,000 00
	<hr/>
	\$2,247,000 00

Debit the tribes with—

Amount expended in removing the portion of the 260 individuals mentioned in finding 15.....	\$9,464 08
10,240 acres allotted to the 32 individuals mentioned in finding 15, at \$1 per acre.....	10,240 00
Amount invested for Tonawanda band.....	256,000 00
	<hr/>
	\$275,704 08
	<hr/>
Balance.	\$1,971,295 92

BY THE COURT.

Filed January 11, 1892.

A true copy.

Test, this 16th day of January, A. D. 1892.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

N^o. 106.

FEB 26 1898
JAMES H. MCKENNEY,
CLERK

Second Cir. Dy. of Miller, Barker
Choate, Jenkins & McGowan for
Supreme Court of the United States. App

OCTOBER TERM, 1897.

Filed ^{No. 106.} *Feb. 26, 1898.*

THE NEW YORK INDIANS, *Appellants,*

vs.

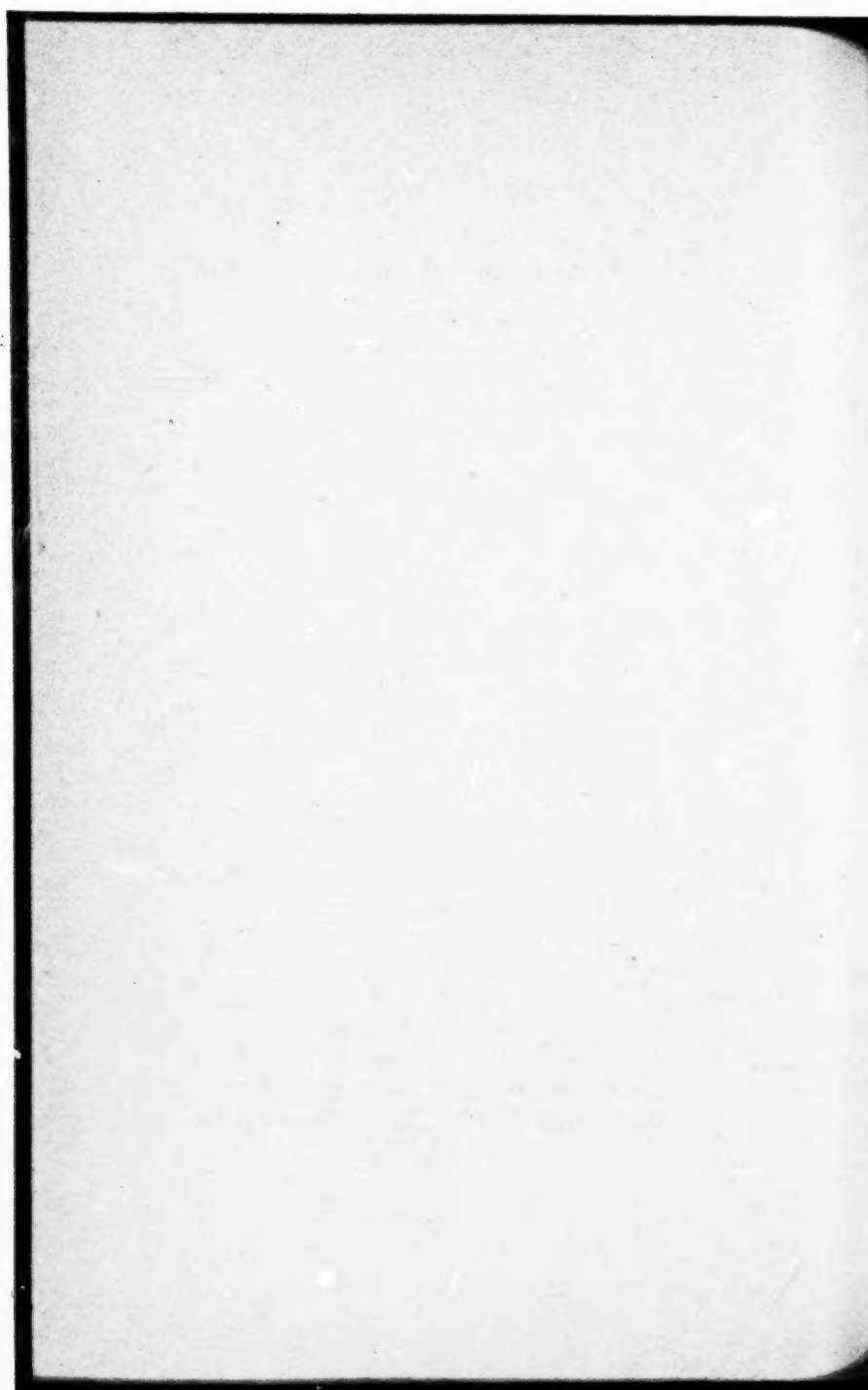
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

SECOND ADDITIONAL BRIEF FOR THE APPEL-
LANTS ON REARGUMENT.

GUION MILLER,
GEORGE BARKER,
For the Appellants.

JOSEPH H. CHOATE,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
Of Counsel.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS,	}	No. 106.
<i>Appellants,</i>		
vs.		
THE UNITED STATES.		

SECOND ADDITIONAL BRIEF FOR THE APPELLANTS ON REARGUMENT.

Counsel in this cause being without any intimation from the Court as to the particular point or points to which the reargument is desired to be addressed, counsel for the appellants have heretofore prepared an additional brief dealing with the questions, (1) Whether the treaty of Buffalo Creek was duly ratified and proclaimed, and, (2) whether the treaty was thereafter recognized by both of the parties thereto as binding on them and governing their relations and obligations to one another.

The recent discovery by counsel for the appellants of the document hereinafter dealt with and called "Confidential B." suggests the advisability of treating additionally the question of the ratification and proclamation of the treaty, and also of dealing a little more fully with the operation of the treaty as a grant to the Indians of the lands set apart for them.

What Constitutes the Treaty of Buffalo Creek.

1. THE ACTUAL MAKING OF THE TREATY, WHAT IT WAS.

It is submitted that the last proviso to the resolution of the Senate of June 11, 1838 (Rec., p. 17), in the following words, to-wit: "Provided, further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and thirty acres only," forms no part of the treaty and should not be considered in connection with this case as is insisted upon by the Attorney-General.

Aside from the fact that this proviso forms no part of the treaty as proclaimed and published, the records of the Senate and of the State Department show that the Indians never assented to this proviso, and that the Senate, subsequent to June 11, 1838, ratified a re-draft of the treaty as amended, which had been assented to by the Indians, and which did not contain the proviso in question.

After the amendments of the Senate by the resolution of June 11, 1838, the treaty was re-drafted so as to embody those amendments, *omitting the provisos*, and to this re-draft were copied the signatures attached to the original treaty, and the separate forms for the assents of the several tribes to the amendments were added thereto.

This modified form of the treaty was duly submitted to the several tribes assembled in council, in pursuance of the requirements of the proviso of the Senate, and each of the tribes attached their assent to this re-draft, to the satisfaction of the President and Senate, with the exception of the Senecas.

(Message of President Van Buren to the Senate January 21, 1839; Executive Journal, Vol. 5, page 182. Report of Committee on Indian Affairs of the Senate, February 28, 1839; Executive Journal, Vol. 5, page 208.)

That these original assents were attached to this re-draft appears by inspection of the document itself which is on file in the State Department forming a part of proclamation of President Van Buren. An examination of this document shows conclusively that the Indians assented to the treaty as re-drafted with the proviso omitted.

This is also proven by the report of the Committee on Indian Affairs above cited, for in it they say: "At page sixteen of the same document, in the letter aforesaid (from Gillett to Crawford) the Commissioner, after describing the course he had taken to obtain signatures of assent to the amended treaty by obtaining leases for them, &c., states, 'I presented the manuscript copy of the amended treaty, to which I had attached a written assent.'"

(Executive Journal, Vol. 5, p. 209.)

That the Senate acted upon this re-draft of the treaty is equally certain, for on January 21, 1839, President Van Buren, with a message of that date, submitted "the treaty in its modified form to the Senate for its advice in regard of the sufficiency of the assent of the Senecas to the amendments proposed."

(Executive Journal, Vol. 5, p. 182.)

And on February 28, 1839, the Committee on Indian Affairs of the Senate made the report to the Senate in regard thereto above referred to (Executive Journal, Vol 5, p. 208), and on March 2, 1839, the Senate by a two-thirds vote—

"*Resolved*, That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of

Indians has been given to the *amended treaty* of June 11, 1838, with the New York Indians, according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommend that the President make proclamation of said treaty and carry the same into effect." (Rec., p. 17.)

(Executive Journal, Vol. 5, p. 218.)

And on March 25, 1840, after the *amended treaty* had been returned to the Senate and considered by the Committee on Indian Affairs, the Senate—

"*Resolved*, That in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th day of June, 1838, have been *satisfactorily* acceded to, and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation."

(Rec., p. 18.)

That it was "*the treaty in its modified form*," that is the re-draft of the treaty just as it now appears in 7th Statutes, 550, and with the proviso omitted, that was before the Senate when these two resolutions of March 2, 1839 and March 25, 1840, were enacted, is established beyond all controversy by Executive Document, "Confidential B.," 1st Session, 26th Congress, which was ordered printed in confidence for the use of the Senate on January 15, 1840, and a copy of which is now in the custody of the Executive Clerk of the Senate. So much of the document as is deemed material is printed, with connecting explanatory remarks, as an appendix hereto.*

* The existence of this document was unknown to the counsel for the appellants at the time of the prior argument of this case, and it only came to their notice after a careful personal examination in the vault of the Executive Clerk of the Senate, and they have been unable to discover any other copy of the document, though they are informed that one was transmitted with the treaty to the President at the time of final ratification.

This document contains the full history of the treaty while before the Senate up to the time it was printed.

It contains among other things the treaty as originally drafted, the amendments proposed by the Senate, the re-draft of the treaty with the messages of the President relative to the same, and the reports of the Commissioner of Indian Affairs and of the Secretary of War, and the report of the Committee on Indian Affairs of the Senate, together with numerous petitions for and against the ratification of the treaty.

The titling of this document is as follows :

" 26th Congress. (Confidential B.) 1st Session.
Message

from the President of the United States
transmitting the amended treaty with the New York Indians
and certain documents relating thereto.

January 14, 1840. Read with the treaty and documents,
referred to the Committee on Indian Affairs.

Jan. 15, 1840. Ordered that the message, treaty and accompanying documents be printed in confidence for the use of the Senate."

And " the treaty in its modified form " is set forth as appears in the Appendix, beginning at page 1.

As the assent of the Senecas to the modified treaty was not satisfactory, it was, on October 30, 1838, recommitted to United States Commissioner R. H. Gillet, and on January 11, 1839, Mr. Gillet makes his report to Honorable T. Hartley Crawford, Commissioner of Indian Affairs, showing that the signatures of ten additional Seneca chiefs had been obtained.

This report is found in the Executive Document, " Confidential B.," beginning on page 68, and is as appears in the Appendix, post, pages 12-16.

Thereupon, on January 15, 1839, Commissioner Crawford transmitted the amended treaty with Mr. Gillet's report to

Hon. J. R. Poinsett, Secretary of War, and on January 18, 1839, he adds a note that, "Since the above report was made an additional signature has been obtained to the treaty as amended, viz ; Kenjuquide, by his attorneys, N. T. Strong and White Seneca, to whom authority was given for this purpose by letter of attorney, filed 18th of January, 1839. T. H. C."

Executive Document, "Confidential B.," pages 90 and 91.

On page 73 of "Confidential B." appear these additional, signatures, as set out in the Appendix, post, page 17, thus leaving the treaty just as it now appears in the State Department, and as printed in 7th Statutes.

On January 19, 1839, Secretary Poinsett transmitted the amended treaty, etc., to the President ("Confidential B.," pages 91 and 92), and on January 21, 1839, the President submits "*the treaty in its modified form*" to the Senate in the following message :

"To the Senate of the United States.

"I transmit a treaty negotiated with the New York Indians which was submitted to your body in June last and amended.

"The amendments have, in pursuance of the requirement of the Senate, been submitted to each of the tribes assembled in council, for their free and voluntary assent or dissent thereto. In respect to all the tribes, except the Senecas, the result of this application has been entirely satisfactory. It will be seen by the accompanying papers that of this tribe, the most important of those concerned, the assent of only forty-two out of eighty-one chiefs has been obtained. I deem it advisable, under the circumstances, to submit the treaty *in its modified form* to the Senate for its advice in regard of the sufficiency of the assent of the Senecas to the amendments proposed.

"Signed

M. VAN BUREN.

"Washington 21st January 1839."

"Confidential B.," page 92.

Executive Journal, Vol. 5, page 182.

Whereupon the Committee on Indian Affairs reported to the Senate on February 28, 1839, and on March 2, 1839, the Senate by a two-thirds vote passed the resolution already cited. (Rec., p. 17.)

Executive Journal, Vol. 5, pages 208 and 218.
 "Confidential B.," page 92.

Thereafter, in August, 1839, the Secretary of War, J. R. Poinsett, held a council with the Six Nations on the Cata-raugus Reservation to further consider the treaty ("Confidential B.," pp. 93, etc.), and thereafter, on January 13, 1840, the President again submits the amended treaty to the Senate with a message.

"Confidential B.," page 1.
 Executive Journal, Vol. 5, page 242.

Whereupon the Senate passed the resolution of March 25, 1840 (Rec., p. 18), and the President proclaimed the treaty as it now appears in 7th Statutes. (Rec., pp. 17 and 18.)

It thus appears beyond all doubt that the treaty in its modified form, as it now appears in the State Department and in 7th Statutes, and without the *proviso* in question forming any part of it, was before the Senate for a period of over a year, was fully discussed, and was twice considered by the Committee on Indian Affairs, and was twice the subject of resolution by the Senate. It surely cannot be maintained, in view of these facts, that this *proviso* forms any part of the treaty that we have now to consider.

The resolution of the Senate, adopted on March 2, 1839, referring to the treaty as consented to by the Indian tribes, was a ratification of the same by that body. This is the plain meaning and effect of the resolution, without any reference to the prior resolution of June 11, 1838.

It is thus established that the President and the Senate had a common mind as to the terms of the treaty as negotiated, which are set forth in the proclamation.

The Attorney-General places so much confidence in this proviso and rests so much of his defence upon it that we have felt called upon to go into the matter fully, and with, perhaps, unnecessary particularity, so that no doubt might exist on the subject.

If this Court should hold that, under the jurisdictional act, the question is an open one, whether the treaty has been ratified by the United States as provided by the Constitution, then we insist that the court below has found that it was regularly negotiated and ratified.

2. THE SUBSEQUENT CONDUCT OF THE PARTIES AS BEARING ON THE QUESTION WHAT THE TREATY MEANT AND NOW MEANS.

The acts of the United States since the making of the treaty involve a recognition of it as valid and subsisting in the terms in which it was proclaimed, and the United States cannot now be heard to assert the contrary.

Since the treaty was proclaimed by the President, the treaty-making power has repeatedly recognized the treaty as valid and binding on the parties thereto, by negotiating other treaties with the Indians, amending the treaty of 1838 in essential particulars, changing the obligations of the Government thereunder, and releasing the Indians from some of their stipulations contained therein.

In the treaty with the Seneca Indians, concluded May 20, 1842 (printed in Vol. 7 of the Statutes at page 586), the preamble contains this recital:

"Whereas a treaty was heretofore concluded and made between the said United States and the Chiefs, headmen and warriors of the several Tribes of the New York Indians, dated the 15th day of January, in the year of our Lord one

thousand eight hundred and thirty-eight, which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth day of April, one thousand eight hundred and forty to have been duly ratified."

The provisions of this treaty, among other things, changes the terms of the treaty of 1838, in these respects :

(1) The sale and relinquishment by the Senecas of their four reservations in the State of New York, by which the Seneca Nation retain the right to continue in the occupation of two of such reservations, which, by the treaty of 1838, they agreed to surrender to Ogden and Fellows and remove therefrom.

(2) In the new articles in this treaty, which are directly between the United States and the Seneca Nation is the following :

"The United States further consent and agree, that any number of said nation who shall remove from the State of New York under the provisions of the above mentioned treaty proclaimed as aforesaid, on the fourth day of April, one thousand eight hundred and forty, shall be entitled in proportion to their relative number to all the benefits of said treaty."

[The terms of the 10th article of the treaty of 1838 are amended and the United States assumes new obligations, and the treaty of 1838 is modified in conformity to the stipulations and provisions of this new treaty.

The treaty of 1857, with the Tonawanda Band of the Seneca Nation of Indians, ratified by the Senate June 4, 1858, proclaimed by the President March 31, 1859, in terms refers to the treaty of 1838, as having been made between the Six Nations of New York Indians and the United States, on the 15th day of January, 1838. The treaty then mentions the benefit and advantages acquired

by the United States by the last-named treaty, and most of the stipulations made by the United States are in substance and effect the same as we now claim them to be. This last treaty is so entirely based on the provisions of the treaty of 1838 that it would be a senseless and unnecessary document, and could not be carried into effect, and its executed provisions would necessarily become inoperative, if the treaty of 1838 were declared invalid and not binding on all the parties.

Without stating in this connection the nature and the character of the said treaty of 1857, we respectfully ask the Court to consult its provisions.

If the treaty of 1838 never became valid and operative, then the private parties to the treaty failed to acquire title to any of the lands purchased by them of the Indians, for which they have paid a large consideration, and the United States never acquired the Indian title to the Wisconsin Reservation, consisting of 500,000 acres.

The jurisdictional act is a complete and unqualified recognition by the political branch of the nation that the treaty of 1838 was duly negotiated as proclaimed.

The Congress possessed the power to recognize the treaty as a valid contract, and it is reasonable to suppose it was prompted to do so by the actual condition of things, and to allow the claim made by the Indians to be determined freed from the question now under consideration if it had any foundation in the history of the case.

This Court is without jurisdiction to investigate all the questions involved in the demand for reliefs as the same was presented to Congress. The act determined some of the important questions. The demand for interest on any sum allowed by the Court is denied. The defence of the Statute of Limitations is waived.

The functions of this tribunal are limited and specifically enumerated, to-wit :

"To hear and enter up judgment" on "the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of the said treaty on the part of the United States."

In considering the questions as thus stated by Congress, they involve only two general propositions for the Court to determine—

(1) What were the obligations and stipulations on the part of the United States as set forth in the treaty ?

(2) Have the Indians forfeited, waived or abandoned any of their rights or privileges secured to them by the treaty, and if not, then what are their legitimate damages ?

It is unnecessary to inquire as to the motives, which may have moved Congress to recognize the treaty as valid and properly negotiated, if in fact or law it was not.

In view of the condition of things, as then existing, to intelligent minds, they are obvious, and among them may be stated—

(1) The Indians had conveyed their title to the Wisconsin lands and removed therefrom and the United States had sold the same and received the compensation therefor.

(2) The rule of comity as it exists between friendly nations in view of all the circumstances, would induce a great nation to withdraw such a defence and act from a sense of justice and equity.

(3) The law of the land applicable to dealings between guardian and ward ; the parties to this treaty hold that relation toward each other.

(4) The great wrong and injustice that would follow, if the treaty should be declared invalid ; never to have had a legal existence.

By the jurisdictional act in this case the Court is precluded from considering whether or not the treaty of Buffalo Creek was properly executed, ratified and proclaimed, or whether there is any treaty now existing. These questions are political and have been determined by the political branch of the Government by the Act of reference. That Act provides "That jurisdiction is hereby conferred on the Court of Claims to hear and enter up judgment as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States."

In the case of *The Old Settlers*, 148 U. S., 427, this Court says, on page 468 :

"It will be perceived that that decision (*U. S. vs. Arredondo*, 6 Peters, 691) is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution, nor does any such question arise in the case before us. There is nothing in the jurisdictional Act of February 25, 1889, inconsistent with the treaty of 1846 (or any other) and nothing to indicate that Congress attempted by that Act to authorize the Courts to proceed in disregard thereof.*

"Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption

*The jurisdictional act in this case was, moreover, as will be seen, very much broader; it was as follows: "The Claim of the Old Settlers hereby is referred to the Court of Claims for adjudication, and jurisdiction is hereby conferred on said Court to try said cause, it being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in said cause on behalf of either party thereto and render final judgment thereon."

is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the Act does not in the least degree justify any such inference."

* * * * *

"As a case arises under the Constitution or laws of the United States, whenever its decision depends upon the correct construction of either, (*Cohens vs. Virginia*, 6 Wheat., 264; *Osborn vs. Bank of United States*, 9 Wheat., 738); so a case arising from or growing out of a treaty is one involving rights given or protected by a treaty. *Owings vs. Norwood*, 5 Cranch, 244."

"The settlement of the controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged."

"The Court of Claims was, indeed, to have 'unrestricted latitude in adjusting and determining the said claim, so that the rights legal and equitable, both of the United States and of the said Indians may be fully considered and determined.' But this did not mean that either party was entitled to have or receive by virtue of the Act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play, for the disposal of the case."

* * * And, therefore, if conflict existed between treaty provisions or between any of them and subsequent act of Congress, such provisions must necessarily give way and be held invalid; but the language used did not involve a confusion of the respective powers of the departments of the government nor furnish a basis for an external attack upon the validity of executive or legislative action."

So in this case, as there is no pretense that the treaty has ever been abrogated, modified or destroyed by executive or legislative action, but on the other hand its existence has

frequently been recognized by all the branches of the government, the United States can certainly not be allowed in these proceedings to question the full operation of the treaty itself, but is confined exclusively to a consideration of the rights of the Indians under the treaty. That the treaty was objectionable to many of the Indians; that they did not wish to give up their New York homes and move west; that many of them were fraudulently induced to sign the treaty, and continued to protest against it up to the time of its proclamation, and even after; are all questions that are closed to us in this case. What were the Indians entitled to by the terms of the treaty? What have they received? Is there anything due them? These are the only questions that can be considered.

It has already been shown that the treaty which we are to consider is the treaty *just* as it appears in 7th Statutes, 550. That the Act of reference had in view the treaty in that form can hardly be questioned.

What then was given to the Indians by this treaty?

We submit that it constitutes a grant *in presenti* of the Kansas lands to the New York Indians.

Without wishing to repeat what has already been said on this subject on pages 10 to 13 of our Additional Brief, we contend that the language used and the objects to be accomplished by the treaty plainly indicate that such was the intention of all the parties to the treaty.

II.

The treaty made, in contemplation of law, a present grant to the Indians of the lands reserved.

The purpose of the treaty was to effect an exchange of title or interest in lands, and to secure to each party the full benefit and advantages of the exchange required that a title *in presenti* should be secured to each party.

As to the Wisconsin lands, the New York Indians had acquired, by the treaty of 1831, an Indian title, which secured to them the rights of occupancy of the same as a home ; to use and cultivate the lands for their maintenance so long as they remained thereon.

See 7th Vol. of Statutes U. S., p. 342.

This title they ceded to the United States by Article 1, the words of the grant being :

"Thereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menominee treaty of 1831."

By the force of these words the title and interest of the Indians in those lands passed *in presenti* to the United States.

"In consideration of the above cession and relinquishment, the United States agree to set apart the following tract of country" (describing the same by metes and bounds) "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin, or elsewhere in the United States, who have no permanent homes." "To have and hold the same in fee simple to the said Tribes or Nations of Indians."

By force of these words a title or interest in the Kansas Lands vested on the ratification of the treaty.

The promise of the United States, as contained in the 4th article, which is as follows :

"Perpetual peace and friendship shall exist between the United States and the New York Indians, and the United States *hereby* agree to protect and defend them in the peaceable possession and enjoyment of their new homes and *hereby* secure to them, in said Country the right to establish their own form of government, appoint their own officers, and administer their own laws,"

is in legal effect the equivalent of a covenant of quiet enjoyment, and where such a covenant appears in any instrument securing to one of the parties an interest in real estate, the same indicates that the title has passed to the grantee, and such was the intention of both parties without use of the customary words grant, convey or alienate.

The meaning of said covenant is made plain by reference to one of the provisions of an act of Congress, passed May 30, 1830, and referred to in Article 2d, of the treaty of 1838, making the terms of that Act applicable to the treaty and a part thereof. The 4th section is as follows:

"That in making any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with whom the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the Country so exchanged with them; and if they prefer it the United States shall cause a patent grant to be made and executed to them for the same, provided always, that such lands shall revert to the United States, if the Indians become extinct or abandon the same."

The patent or grant referred to, to be thereafter issued to the Indians, was not intended to be the instrument by which the Indian tribes making the exchange secured its right, estate and a title to the lands for which the exchange was made, but the further grant or patent was to be merely a muniment of the title acquired on making the exchange, by and with which they could defend their title.

That the Indians understood and believed that on the ratification of the treaty they secured a vested right and estate in the Kansas lands is manifested by the significant fact that at the time of the making of the treaty of 1838, the Seneca Nation conveyed with the approbation of the United States, all their lands in the State of New York, to Ogden and Fellows, being four reservations, on which they then re-

sided, containing in the aggregate 113,000 acres of fertile and valuable land.

See Treaty, article 10, finding No. 8, and copy of deed attached to the Treaty.

It is incredible that the United States did not intend to convey and secure to this nation of Indians a present title to the Kansas lands without the full right to occupy and enjoy the lands designated in the treaty as "their future and permanent" home.

(This tribe then numbered 2,309. See schedule "A.")

The provision found in Article 2 giving the several tribes "full power and authority, in the said Indians to divide said lands among the different tribes, nations and bands, in severalty, with the right to sell and convey, to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by general council of the New York Indians, acting for the tribes collectively," taken in connection with the forfeiture clause in Article 3, is inconsistent with the contention, that, the title did not vest presently on the proclamation of the treaty.

Schulenberg vs. Harriman, 21 Wall., 62.

The proviso in the 4th section of the act of Congress above referred to that "such lands shall revert to the United States, if the Indians become extinct or abandon the same," is a condition subsequent, and it likewise implies that a title had vested in the Indians.

Schulenberg vs. Harriman, 21 Wall., p. 60.

Holden vs. Joy, 17 Wall., 211.

The contention of the Attorney-General that the treaty does not contain a present grant, but that it is only a

promise of a grant in the future, and that a patent was necessary to vest the title in the Indians, is completely met by the case of *Rutherford vs. Greene's Heirs*, 2 Wheat., 196.

"The 10th section (of Act of State of North Carolina of 1782) enacts that 25,000 acres of land shall be allotted for and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.

"This is the foundation of the title of the appellees.

"On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed of any specific land, but 25,000 acres in the territory set apart for the officers and soldiers. * * *

"It has been said that, to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read 'shall be allotted for, and are hereby given to,' &c. Were it even true that these words would make the gift more explicit which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene. * * *

"Against this conclusion has been urged that article in the constitution of North Carolina which directs that there should be a seal of the State to be kept by the Governor and affixed to all grants. This legislative act, it is said, cannot amount to a grant, since it wants a formality required by the constitution.

"This provision of the constitution is so obviously intended for the completion and authentication of an instrument, attesting a title previously created by law, which

instrument is so obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself, that the court would certainly have thought it unnecessary to advert to it had not the argument been urged repeatedly and with much earnestness, by counsel of the highest respectability. * * *

"It is clearly and unanimously the opinion of this Court that the act of 1782 vested a title in General Greene to 25,000 acres of land to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title and attached it to the land surveyed."

Rutherford vs. Greene's Heirs, 2 Wheat., 196.

And again in *Fremont's* case this Court says :

"The principles decided in this case (*Greene's Heirs*) appear to the Court to be conclusive as to the legal effect of the grant to Alvarado.

"It recognizes as a general principle of justice and municipal law that such a grant for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest."

Fremont vs. United States, 17 How., 542.

It will be noted that both in *Greene's* and *Fremont's* cases there was a valuable consideration already existing, entirely independent of the general future benefit to be expected from the settlement of the country, just as in this case the cession to the government of the Wisconsin lands was not only a valuable consideration but in reality the only consideration for the grant of the Kansas lands, as the agreement to remove west is not named as part of the consideration for the Kansas lands.

The difference in principle between cases such as these and "gratuitous concessions" made under a colonization scheme, which are conditioned upon settlement and consti-

tute "a naked authority or permission, and nothing more," is clearly set forth in the Court's opinion in Fremont's case, 17 How., 542, and the case of Boisdore, 11 How., 94, and others cited by the Attorney-General are particularly considered and distinguished.

"This brief statement of the facts in these cases, shows that the parties had acquired no right, legal or equitable, to these lands under the Spanish government. The instruments under which they claimed were evidently not intended as donations of the land, as a matter of favor to the individual, or as a reward of services rendered to the public."

Fremont's Case, 17 How., 542.

Moreover, in Fremont's case, the cession was made subject to the approbation of the Departmental Assembly, and conditioned upon taking possession of the land; having the same surveyed; and building a house within a certain time, none of which had been complied with, nor was the definite grant signed by the governor as called for by the Regulations, and yet this Court held that the title was a vested one.

It will also be noted that one of the difficulties usually met with in this class of cases is entirely absent in the appellant's case, namely, indefiniteness as to the location and extent of the lands granted. By the Article 2 of the treaty of Buffalo Creek, the boundaries of the tract granted are specifically set forth so that a complete plat of the lands could be made without any actual survey on the ground. The particular lands included were fully and absolutely identified. There was no need of a patent to further identify and make certain the grant. Moreover the survey of the lands was made.

The case of Doe *vs.* Wilson, 23 Howard, 457, likewise sustains us in our contention that the treaty of Buffalo

Creek vested a title in the appellants. The facts of that case are as follows :

By the treaty of 1832 between the United States and the Pottawatomies that nation ceded certain lands to the United States making certain reservations in favor of individual Pottawatomies, and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides that "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries shall correspond with the public surveys."

In 1833, before the lands were surveyed, or the reserved sections selected, Pet-chi-co, by a deed in fee-simple, conveyed to Coquillard and Colerick "all those two sections of land lying in the State aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." On the trial below the court was asked to instruct the jury "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable, he having died before the location of the land, and before the patents issued." The court refused to give this instruction.

Upon this state of facts this Court says :

"The only question presented by the record that we feel ourselves called on to decide is whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick."

And again, in conclusion—

"We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands, reserved to him and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living."

The Court in substance holds that the treaty of 1832 vested *in presenti* a title in Pet-chi-co to the two sections of land reserved to him, before the lands had been surveyed or selected, and before any patent had issued. That decision is in direct conflict with the position taken by the Attorney-General in this case.

The language of Article 2 of the treaty of Buffalo Creek that the "United States agrees to set apart" the Kansas lands "to have and to hold the same in fee simple," &c., and the expression in Article 5, "The Oneidas *are to have* their lands," &c., together with the language in Article 10, "It is agreed with the Senecas that they *shall have* for themselves and their friends * * * the easterly part of the tract *set apart*, &c.," and that used in Article 14, "It is further agreed that the Tuscaroras *shall have* their lands in the Indian country," &c., make out a case of a grant to the appellants very similar to that declared by this Court to have passed by the supplementary treaty between the United States and the Caddoes in *United States vs. Brooks*, 10 Howard, 442.

This treaty provided :

"Article 1st. It is agreed that the legal representatives of the said Francois Grappe, deceased, and his three sons, Jacques, Dominique and Balthazer Grappe, shall have their rights to the said four leagues of land reserved for them and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddoe Nation of Indians, as expressed in the treaty to which these articles are supplementary."

The Attorney for the United States asked the District Court to charge the jury that the supplementary treaty does not amount in law to a grant of four leagues of land from the United States to Francois Grappe and his sons, which was refused, and exception taken.

In its opinion on the appeal taken this Court says :

" All of us concur in opinion, that no exception was taken by the counsel of the United States to the rulings of the District Court in this case, which can be sustained here.

" We think that the treaty gave to the Grappes a fee simple title to all the rights which the Caddoes had in these lands, as fully as any patent from the Government could make one."

If the words "it is agreed" that the said Grappe "shall have their right" to the said land "reserved for them," "to be taken out of the lands ceded to the United States," constitute a grant, surely the words "agree to set apart," "are to have their lands," "it is agreed that they shall have the easterly part of the tract set apart," must be given like construction.

The appellants were to receive nothing from the United States in return for their Wisconsin lands except the Kansas lands and the \$400,000. When, therefore, they absolutely parted with all title to the Wisconsin land and vested it in the United States, can it be presumed that they were not at once to receive in exchange the Kansas lands and the appropriation of the \$400,000?

"In the solemn treaties between nations it can never be presumed that either State intends to provide the means of perpetrating or protecting frauds; but all the provisions are to be construed as intended to be applied to *bona fide* transactions."

United States vs. Amistad, 15 Peters, 595.

To construe the treaty to mean that the Indians must at once take up their abode in the west in order to vest in them the title to the Kansas lands, would be providing the United States with means to perpetrate a fraud and to secure the Wisconsin lands without paying for them, for the

United States was fully aware of the fact that many of the Indians were bitterly opposed to an immediate removal west. The United States knew also that the Indians could not remove to the west without the appropriation of the \$400,000, nor could they go without the guidance of the United States.

The Attorney-General calls attention to the fact that the treaty as finally ratified does not contain the word "grant," and argues from this that no present title vested in the Indians at the time of the proclamation of the treaty. That the word "grant" is not necessary to create such a title is fully established by authority, but that the parties to the treaty regarded the provisions of Article 2 as a grant is made certain by Article 5 of the treaty as originally drafted (Record, p. 13) wherein the expression "the foregoing grant" is used in reference to the provisions of Article 2.

While it is true that original Article 5 was stricken out by the amendments of the Senate it was for reasons entirely independent of this expression, and we can still look to that article to ascertain what construction the parties to the treaty at the time it was entered into placed upon Article 2.

"In the interpretation of statutes, clauses which have been repealed may still be considered in construing the provisions that remain in force."

Ex parte Crow Dog, 109 U. S., 556.

By the terms of the treaty of 1838, therefore, the United States transferred a title *in presenti*, to the lands described therein, to the New York Indians.

The title thus secured to the Indians, was in its nature and character a fee in the lands, or an Indian Title within the meaning of that term, as the same is commonly used in transactions with Indian Tribes concerning lands.

Their title and estate was complete, on the ratification of

the treaty, without an issue of a patent, as provided for in the act of May 28, 1830, referred to in the 2d article of the treaty.

The right to take possession of the lands and enjoy the same, was not postponed and made dependent on the United States issuing a patent therefor. This is manifest by the other terms of the treaty and the course of dealings with Indian Tribes, for the exchange of lands. A patent issued in the form commonly used in instances like this, does not contain terms which in legal effect would secure more to the Indians than was secured to them by the other affirmative stipulations of the treaty.

The purpose of the patent, if one was called for on the request of the Indians, was to provide evidence or proof, of the transaction resulting in the exchange of lands.

By the common law, it was unnecessary to effect a transfer of title to land, that there should be a conveyance by deed or any instrument in writing executed by the owner; it was sufficient to put the purchaser in possession. If a deed was also executed by the owner and delivered to the purchaser, it did not transfer to him the title, but it became evidence of the fact that the title had been transferred by seizin.

1 Washburn on Real Estate, p. 45, Book 1, Chap. 2.

3 Washburn on Real Estate, Book 3, Chap. 4, p. 213.

It is unnecessary to mention the changes made in the common law or in the provisions of modern statutes on the subject, for it cannot be disputed that the United States may transfer title to land by an act of Congress or by treaty, without the use of technical words, nor is it necessary that a patent therefor should issue to consummate a complete transfer of the title.

A treaty is the supreme law of the land and is to be construed so as to carry out the intention of the parties,

to be ascertained by considering the objects to be secured by the treaty the language used and all the surrounding circumstances.

Schulenberg *vs.* Harriman, 21 Wall., 62.

3 Washburn on Real Estate, p. 172, Book 3, Chap. 3.

The rule sometimes applied in giving construction to grants by the government to individuals, that the same be interpreted most strongly in favor of the government and against the grantee, has no application where the grantee has paid a consideration therefor.

3 Washburn on Real Estate, Book 3, Chap. 3, p. 172.

Mr. Washburn says:

"The rule may be stated as a general one in respect to legislative grants in this country, that such grants should be construed liberally in favor of the grantee and in such manner as to give them full and liberal operation, and to carry out the legislative intent when that can be ascertained."

3 Washburn, *Id.*

In giving construction to a treaty between sovereign powers it is obvious the rule must be the same, and where disputation arises between the United States and Indian Tribes a very liberal rule should be adopted in favor of the latter, and this rule has been often applied by this Court.

In determining the nature and character of the title, interest, and estate transferred to the Indian Tribes under the treaty, the intention of the parties thereto will not be defeated by any existing rule of the common law or the provision of any statute on the subject, as the treaty-making power can effect a transfer of title to land by the use of any language indicating such purpose.

Where, by the terms of an instrument in writing relating to lands, a party thereto secures an estate therein from the owner, which may have perpetual continuance, it is deemed to be a fee.

1 Washburn on Real Estate, p. 76, Book 1, Chap. 3, and the cases cited by the author.

The terms of the treaty, by force of the language used, secure to the Indian Tribes an estate or interest in the Kansas lands, which may have perpetual continuance and may be properly termed a fee.

Every recital in the treaty and all of the stipulations and covenants therein must be considered to ascertain the intention of the parties.

The chief purpose of the respective parties in making the treaty is stated in the preamble, and aids us in giving a proper construction to the language employed in the several articles of the treaty.

We quote the following:

"And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many were in favor of emigrating, preferred to remove at once to the Indian Territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory."

This recital discloses the object and purpose of the Indians in consenting to make the exchange, to wit: to secure a "permanent and peaceful home" west of the Mississippi. The President assented to this; and "determined to carry out this humane policy of the government in removing the Indians from the east to the west of the Mississippi, which it is for their interest to do so without delay."

By the 1st article the Indians, in consideration of the facts and purposes above recited, and the *Covenants* set forth in the following article "to be performed on the part of the United States," ceded to the United States "all their right, title and interest" *in presenti* in their Wisconsin lands.

We contend that by the 2d article the United States transferred to the Indians a title *in presenti* to the Kansas lands, and that such is the meaning and legal effect of the promises and stipulations entered into by the government and that such was the intention of both parties.

The lands were fully described by metes and bounds, and the United States agreed "to set apart the lands described as a permanent home for the New York Indians now residing in the State of New York or Wisconsin"
 * * * "to have and to hold the same in fee simple"
 * * * "with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the New York Indians acting for all the tribes collectively."

In this connection should be considered the Covenant on the part of the United States, contained in the 4th article, to wit: the United States "hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes and the right to establish their own form of government, appoint their own officers and administer their own laws," subject to the right of Congress to regulate trade and intercourse with the Indian Tribes..

These recitals, concessions and stipulations establish indisputably the following facts and legal propositions:

- (1) That the purpose of the treaty, on the part of the In-

dian Tribes, was to secure for themselves a new and permanent home in the territory described.

(2) That the Indians paid a valuable consideration in land for the lands taken by them in exchange which vested a title in the United States *in presenti* ; on the ratification of the treaty.

(3) That the United States largely relinquished the right of sovereignty over the territory designated and bestowed the same on the Indian Tribes, giving them the feature of nationality and promised to secure and defend them in the enjoyment of their homes.

These rights and privileges in and over the territory became vested in the Indian Tribes on the ratification of the treaty, for the language in the 4th article is in the present tense, to wit: "and the United States *hereby guaranty* to protect, defend, etc., etc."

(4) The language in the 4th article should have its full force and significance as no words are found in the treaty which qualify or limit its meaning.

The words of the promise "to guaranty," "to protect," "to defend," "to secure" the Indians "in the peaceable possession of their new homes" are the equivalent of the words "grant and convey," and if used in an instrument between private parties, would vest a title in the grantee in fee simple.

When the owner of lands for a valuable consideration paid undertakes to protect and defend the purchaser in the peaceable possession of the same, it seems absurd for him to claim that the title remains in himself without a clear reservation to that effect.

(5) The Indian Tribes secured the right of perpetual possession by the terms of the treaty which in law constitutes a fee. The condition that the lands should revert to the

United States "if the Indians should become extinct or abandon the same," as provided in the act of 1830, does not prevent a transfer of the title, for the condition is no different in legal effect from other instances, commonly inserted in grants.

It cannot be demonstrated or presumed that the Indian Tribes will ever become extinct or abandon the territory secured to them. They may survive the existence of the government.

The words of the second article: "The United States agree to set apart the following tract of country," should be construed as words in the present tense and not as words constituting a promise to set apart lands for the Indians at some future time, thus making the contract wholly executory on the part of the Government.

The object and purpose of the treaty as set forth in the preamble and in the second article, when read in connection with the positive and affirmative covenants contained in the 4th article in these words: "And the United States hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes," justify and compel such a construction, to carry out the intentions of the parties.

There was no necessity existing for making the promises on the part of the United States executory, the title to the lands intended for the Indians was in the United States and was fully identified, the Indians had conveyed the lands granted by them in exchange for these lands.

A liberal rule of construction should be adopted so as not to prejudice or lessen the estate of the Indians in the lands designated as their future and permanent homes.

How the words of the treaty were understood by these

unlettered people rather than their critical meaning, should form the rule of construction.

Choctaw Nation *vs.* United States, 119 U. S., pp. 27, 28.

It may be firmly assumed that where, in a transaction between parties of equal sagacity for an exchange of lands, one of the contracting parties conveyed a present title of his lands, he would demand a life conveyance to himself of the lands he was to have from the other party.

In other treaties with other Tribes of Indians for an exchange of lands, the language used to complete an exchange of title is substantially the same and in some instances identical with the words in this treaty, and in those cases the tribes secured an Indian title *in presenti* on the ratification of the treaty. The history of dealings with other Indian Tribes for an exchange of lands sustains our contention.

We refer to the treaty with the Quapaw Indians made in 1838, printed in Vol. 7 of the Statutes at Large, at page 424. Other treaties, published in the same volume, tend to support this proposition (see pages 411, 284, 185, 156, 160, 182, 351, 355). On the ratification of these treaties each party acquired a present title in the lands exchanged without further conveyance or assurance of title.

If the Court should hold that the stipulations and promises on the part of the United States are executory, and the Indians secured no title or interest in the Kansas lands, the Court has the power, under the jurisdictional act, to inquire if the United States has performed its stipulations, and if they remain unexecuted without fault or forfeiture on the part of the claimants, then they may recover damages for the loss sustained.

The damages will be the same as if the title had vested

for the sale of the Kansas lands made it impossible for the government to perform its stipulations.

The contentions of the appellants are fully sustained by the following cases, which, for convenience, are here named together :

Rutherford *vs.* Greene's Heirs, 2 Wheat., 196.
 Fremont's Case, 17 How., 559.
 U. S. *vs.* Brooks, 10 How., 442, 460.
 Doe *vs.* Wilson, 23 How., 457.
 Mitchell *vs.* U. S., 9 Pet., 711, 733, 748.
 Schulenberg *vs.* Harriman, 21 Wall., 44.
 Patterson *vs.* Jenks, 2 Pet., 216.
 Foster *vs.* Neilson, 2 Pet., 307.
 U. S. *vs.* Arredondo, 6 Pet., 691, 713, 714.
 Garcia *vs.* Lee, 12 Pet., 511.
 Lattimer *vs.* Poteet, 14 Pet., 4.
 U. S. *vs.* Reynes, 9 How., 127, 153-4.
 Holden *vs.* Joy, 17 Wall., 211, 247-9.
 10 Ops. Atty.-Genl., 507.

The contention that the title to the lands remained in the United States until a patent was issued to the Indians, as provided in the act of 1830, relative to the exchange of lands with Indian tribes, is not sustained.

There is no provision in the treaty to that effect, nor is the act susceptible of such a construction. The reference in the treaty to the said enactment was for other purposes.

First, the object was to secure to the Indians a title to the lands in fee simple, for it is therein expressly provided "that in making such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribes or nations with whom it is made, that, the United States will forever secure and guarantee to their heirs or successors the country so exchanged with them." The Indians have the benefit of this promise, which is in legal effect an absolute warranty of title, *in presenti*, without any other covenant of

the same nature being embraced in the treaty. This assurance is also expressed and made a covenant in the 4th article of the treaty. This provision of the enactment aids in ascertaining the true meaning of the stipulations in the 4th article and they should be read together.

The further provision in the same section of the act relative to the issue of a patent is as follows: "*And if they prefer it*, the United States shall cause a patent grant to be made and executed to them for the same, provided always that such lands shall revert to the United States if the Indians become extinct or abandon the same."

This provision is independent of the preceding one and in no sense is it to stand in lieu of the assurance and guarantee therein contained, but is an additional promise, for the patent is only to be issued on the call of the Indians, and when issued, is intended to be evidence of the transaction or proof of their title.

The provision relative to a reversion of the title to the lands applies whether a patent issues or not.

The word "*prefer*," as here used, is synonymous with the word "*desirable*," so the provision may be read without doing violence to the language as follows: "And if the Indians deem it desirable, the United States shall cause a patent grant to be made," which would perhaps more clearly indicate that a title had passed by the preceding provisions.

In many of the treaties made after the said act of Congress was passed relative to the exchange of lands with Indian Tribes, the language employed left a doubt as to the estate which the Indians acquired in the lands secured to them, and these provisions of the act were made applicable to this exchange and they clearly disclose that a title did pass on the ratification of the treaty. No new consideration was to be paid for a patent and it could be demanded by the In-

dians at any time after they were in the occupation and use of the territory described.

The circumstances that the President was to designate, after the ratification of the treaty, the part and portion of the territory to be occupied by some of the tribes, indicates that a patent was not necessary to pass the title, but it was left for the several tribes to determine for themselves if it was desirable to have a patent describing the lands allotted to each tribe, not that it was necessary to have a patent issued to obtain a title, but to be used as evidence or proof of the title acquired by the terms of the treaty.

If the Indian Tribes did not acquire a fee in the lands under the treaty of 1838, it cannot be disputed but that they secured a title and property in the same, of a nature and character equal to that possessed and enjoyed by the native tribes in the lands they occupied at the time of the creation of the National Government, commonly called an Indian Title.

Such title has been defined by the courts and recognized by the political department of the government as a right to the perpetual possession of the lands so long as they retain their tribal capacity, or the same is extinguished by purchase by the United States or alienated to other parties with the consent of the government.

Johnson & Graham's Lease vs. McIntosh, 8 Wheat., 534.

Fletcher vs. Peck, 5 Cranch., 87.

The Cherokee Nation vs. The State of Georgia, 5 Peters, 1.

Clark vs. Smith, 13 Peters, 195.

United States vs. Clark, 9 Peters, 198.

If the Indian Tribes, parties to this treaty, did not acquire a title and property in the Kansas lands equal in

character and value and as defensible as native tribes have in the lands they occupy, then they received nothing of value in exchange for their Wisconsin lands.

The right, title and estate which the New York Indians secured by the treaty of 1838, is derived from the political power of the nation, the treaty-making power, and by an act of Congress passed in 1830, and referred to in the treaty, which must be read with the treaty, to ascertain by what tenure they have acquired an interest and estate in the lands therein described.

The nature and character of the title and property secured to the Indians is considered in another point.

In this action, this Court has no jurisdiction to inquire and determine, whether the New York Indians have at any time or in any way, or manner forfeited any or all of their property rights in the Kansas lands and for that reason deny them relief.

Where title to or interest in lands is acquired from the government by a public law, that is to say, by treaty or by act of Congress, subject to forfeiture for non-performance of conditions subsequent, the forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership for breach of the condition.

Schulenberg vs. Harriman, 21 Wall., 45.

United States vs. Repentighy, 5 Wall., 267.

In the case of *Schulenberg vs. Harriman* Congress by a special law granted the fee of land to the State of Michigan upon a condition to be performed within a time named, and if not so performed the title was to revert and be fully restored to the nation.

The legal question presented was, had the State of Michigan forfeited its title because of the non-performance of the conditions subsequent. It was held it had not for the reason, that there had been no previous judicial determination authorized by law, adjudging a forfeiture and restoration of the title, nor any legislative enactment asserting ownership for breach of the condition.

If it should be held by this Court, that the Indian Tribes did not acquire by the treaty a title in fee to the Kansas lands, subject to the conditions mentioned, but only a right of possession and use, which should terminate on a breach of the conditions named, then the question presented is, does the rule of law above stated apply in cases where the title or estate secured by a public law is less than a fee?

It is obvious that in a case where a party to a treaty with the United States acquires a title to lands, or any interest or estate therein, and the same is subject to forfeiture on breach of conditions subsequent, the courts of the nation have no jurisdiction to determine that a forfeiture has occurred and decree that the title and estate transferred has been restored by reason thereof, without an act of Congress confirming such jurisdiction.

Our position is, that in such a case Congress cannot confer such jurisdiction so long as the controversy remains between the United States and the other party to the treaty. Treaties are made between independent nations. One of the parties thereto cannot by its own separate action, determine whether the other party has for any reason lost its rights, estate or privilege secured to it by the treaty.

If one of the parties to a treaty claims a right under the same which the other party repudiates, the party making the claim may open negotiations for a settlement of the dispute or resort to war.

The Indian Tribes have consented that the question in disputation in this case, as stated in the jurisdictional act, may be determined by this tribunal by voluntarily appearing and filing their petition for relief. Therefore, the Court must determine, first, what are the matters submitted for its adjudicating by the act. The Court is limited in its investigation to the special question stated therein. It is without jurisdiction to determine any other question of fact or law, not necessarily involved in the hearing and decision of the precise question.

We contend that the specific and only question for the Court to determine is, has the United States executed and performed all the stipulations on its part to be done and performed as set forth in the treaty?

The action by Congress on the claim of the Indian Tribes for indemnity, because the United States had not executed its stipulations, aids in giving construction to the jurisdictional act.

In June, 1884, a bill was pending in Congress, being Senate bill No. 467, for settlement of the said claim. On the 21st day of June, 1884, the Senate made an order referring the bill to the Court of Claims, as provided in an act passed March 3, 1883, commonly called the "Bowman Act," "For the investigation and determination of the facts involved in said bill," and to report the same to the Senate. That tribunal, after hearing the parties, made a report, dated January 16, 1892, being Senate Miscellaneous Document No. 46, 52nd Congress, 1st Session, stating the facts found, which report is set forth in the Record.

Afterwards, on the 18th day of January, 1892, such findings and report were by the Senate referred to the Committee on Appropriations.

On the 14th day of April, 1892, Senator Dawes, a member of the Senate Committee of Indian Affairs, introduced a

bill, being Senate bill 2911, 52nd Congress, 1st Session, for the settlement and payment, "for the unexecuted stipulations of that treaty," as stated in the preamble of the bill. This bill appropriated \$1,970,295.92, to be paid to the Indian Tribes on their release of their interest in the Kansas lands, and to all money for their benefit provided for in the treaty.

On the 12th day of July, 1892, the Senate Committee reported back to the Senate the findings of fact found by the Court of Claims and also the jurisdictional act and recommended its passage. Thereafter that body passed the bill and afterwards and on or about the 20th of January, 1893, the House passed the same without amendment.

On the 9th day of February, 1892, a bill, being a copy of the said Senate bill, for payment of the said claim, was introduced in the House and referred to the Committee on Indian Affairs, being House bill No. 5679, 52nd Congress, 1st Session.

That committee made a report thereon, and recommended the passage of the bill, being House Report No. 1858, 52nd Congress, 1st Session. This report fully considers the case in every view, that the same can be presented. It reviews the facts relative to the question of forfeiture under the 3rd article of the treaty.

The following paragraph from the report indicates that the Committee did consider the question of alleged forfeiture, viz:

"As respects the legal rights of the Indians under the treaty under consideration, the committee deems it necessary to advert to but one feature of the case, namely, the question of the effect of the fact that the Indians did not remove to the Kansas lands within five years after the ratification of the treaty.

"This question has had the committee's full and careful consideration, and the committee is clearly of the opinion that it presents no difficulty whatever in the way of the

rights of the Indians. The language of the treaty, as above appears, is that the Kansas lands were set apart for the Indians on condition that such of them as should not accept and agree to remove within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands. It is seen at a glance that the condition was not removal, but agreement to remove, to be evidenced by acceptance by the Indians of the terms of the treaty. They did accept, and thereby agreed to remove (except the St. Regis tribe, as to whom, as above appears, the treaty was modified in this respect), and thus literally and fully they complied with the imposed condition.

"All question of a forfeiture thus disappeared. It remained only for the President to appoint a time or times for the removal of the Indians. This the President never did, and as in violation of the stipulations of the treaty, by including the lands within the territorial limits of the State of Kansas, throwing them into the public domain and selling them and receiving the money therefor, the United States has made it impossible for the Indians to be removed; a removal is now wholly out of the question, and this too, without any fault of the Indians."

This action by both Houses of the Congress before the passage of the jurisdictional act shows that Congress was possessed of every fact and circumstance bearing on the merits of the claims.

The jurisdiction of this Court is limited to the one single question of fact, to wit: has the United States performed all its stipulations set forth in the treaty, and it has no power to inquire and determine that a forfeiture has occurred, and upon that ground refuse indemnity to the claimants.

The words "unexecuted stipulations on the part of the United States," as used in the jurisdictional act, express the same meaning as the words in the preamble to the bill pending in Congress when this act was passed, to wit: "A bill for

the settlement with the Indians who were parties to and beneficiaries under the treaty concluded at Buffalo Creek, in the State of New York, January 15th, 1838, for the unexecuted stipulations of that treaty." That act appropriated the sum before mentioned to be paid the Indians on giving a release of their interests in the Kansas lands. The question of forfeiture was not referred to in this act, nor made the subject-matter of inquiry in the bill, and the same was disposed of by Congress, by passing the jurisdictional act. At the time the matter was before Congress, all the material facts and circumstances bearing on the merits of the claim were before that body, for the first series of findings of fact by the Court of Claims is in every material fact, the same as the last finding on which the judgment was entered in the court below.

The United States had at the time the said bill for settlement of the claim was introduced in Congress, and when the jurisdictional bill was passed, performed some of its stipulations, and it was so admitted by the claimants and found by the first series of findings of the Court of Claims, to wit: the removal of some of the Indians in 1846, under Commissioner Hogeboom, the release by the Tonawanda Band of their interest in the Kansas lands by the treaty of 1857, and payment by the United States therefor, all of which are mentioned in detail in the first series of findings by the Court of Claims.

Some other stipulations had been performed by the United States, for instance, payment had been made to some of the tribes to individual Indians, of sums of money stipulated in the treaty, for which Congress had made appropriations, which were not ascertained in the first series of findings of the Court of Claims, but are embraced in the last series of findings now before the Court.

In the said bill pending before Congress for settlement

of the claim when the judicial act was passed, these sums so paid were not credited to the United States, in fixing the sum mentioned in the bill to be paid to the Indians, but are set forth in the last findings.

These facts and circumstances made it necessary in order to protect the rights and interests of the United States, that further investigation be made by Congress or some other department of the government, to ascertain if any other stipulation had been performed, and supports our proposition that the jurisdiction of the Court is limited and it is without power to determine that a forfeiture had happened. In all the proceedings before Congress nothing is indicated that the defense of forfeiture was relied upon, if one had taken place.

There are other reasons for giving the act a liberal construction in favor of the Indians, limiting the jurisdiction of the Court.

It may be fairly supposed that before the Indian Tribes consented to submit their demand for indemnity, for unperformed stipulations on the part of the United States to the Court organized under the laws of the United States, it caused the jurisdictional act to be carefully examined for the purpose of ascertaining the precise questions of law and fact to be determined in disposing of their claim. We submit, it would not occur to the mind of any intelligent person that the question of forfeiture as now presented as a defense, was intended to be submitted to the courts for their determination.

Another strong ground that may be stated that Congress intended to waive the defense based on forfeiture, if one had occurred, is that between the year 1846 when a forfeiture occurred, if ever, and the time of the passing of the jurisdictional act, several acts of Congress were passed, fully recognizing that the treaty was in full force and effect and that

the United States had not performed its stipulations which are enumerated in another point.

Then further, in view of the relation of guardian and ward, existing between the parties to the treaty and the dependent condition of the Indian Tribes, Congress moved by a sense of justice and equity refused to make the defense, that the Indian Tribes had forfeited all their rights and interests in the Kansas lands, and for that reason withheld from the courts the power to consider the question.

It is very significant that in all the proceedings had in the matter of this claim, by Congress, by the Executive and by the Departments, no objection has ever been made to the allowance of the same, on the ground of forfeiture, and that point was first presented by the learned Assistant Attorney-General in his argument in the court below and that tribunal did not put its decision on that ground, nor discuss the question in its opinion.

But we submit that the Tonawanda treaty of 1857, taken in connection with the appropriation made in 1859 to carry its provisions into effect, together with the other acts of Congress referred to on pages 12 to 27 of our Additional Brief on Reargument, constitute a construction of the treaty by the political branch of the government which is binding upon the judicial branch.

Foster & Elam vs. Neilson, 2 Pet., 307.

Garcia vs. Lee, 12 Pet., 511.

U. S. vs. Reynes, 9 How., 127, 153-4.

Doe vs. Wilson, 23 How., 457.

Patterson vs. Jenks, 2 Pet., 216.

Latimer vs. Poteet, 14 Pet., 4.

U. S. vs. Arredondo, 6 Pet., 691.

Some of these cases may not unprofitably be briefly noticed.

"Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest between Georgia and the Creeks might claim a construction favorable to the pretensions of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words."

* * * * *

"If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, we should not hesitate to adopt that construction in this case."

* * * * *

"It can scarcely be imagined that Georgia has not settled practically the limits of Franklin County, and any such settlement ought to have been conclusive with the circuit court."

Patterson vs. Jenks, 2 Pet., 230.

"The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty, commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

"We think then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed."

Foster and Elam vs. Neilson, 2 Pet., 307.

If this be true where the legislative will is expressed in a direction most favorable to the government, there would appear to be even more reason for adopting an interpretation which is in accord with the legislative will as clearly expressed *against* the interests of the government.

"If those Departments which are entrusted with the foreign intercourse of the Nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

Foster and Elam *vs.* Neilson, 2 Pet., 309.

If, then, those departments have "unequivocally" recognized the rights of others, and have denied title in the government under a treaty, and the legislature has acted on this construction, surely "it is not in its own courts that this construction is to be denied."

In speaking of the case of Foster and Elam *vs.* Neilson, 2 Pet., 309, this Court says:

"So far from it, the leading principle of the case, which declares that the boundary line determined on as the true one by the political departments of the Government, must be recognized as the true one by the judicial department; was subsequently directly acknowledged and affirmed by this Court in 1832 in the case of the United States *vs.* Arredondo, 6 Pet., 711."

Garcia *vs.* Lee, 12 Peters, 520.

And again:—

"If, therefore, this was a new question, and had not already been decided in this Court, we should be prepared now to adopt all of the principles affirmed in Foster and Elam *vs.* Neilson, with the exception of the one since overruled in the case of the United States *vs.* Percheman, as hereinbefore stated."

Garcia *vs.* Lee, 12 Peters, 522.

The case of Lattimer *vs.* Poteet, 14 Peters, 4, fully sustains our contention in this particular.

By the treaty of Holston the limits of the country of the Cherokees were established. Some of the boundaries were indefinite and were not fully established. Disputes arose as to the true boundary.

Subsequently the United States by the treaty of Pellico, purchased certain lands from the Cherokees, up to what was termed the Hawkins' line, which included lands that it had been claimed were not reserved to the Cherokees by the treaty of Holston.

This Court says:—

"It is true, this line is not in terms said to be the boundary established by the Holston treaty but in the most solemn form it is recognized to be the boundary of the Indian lands by purchasing those lands up to it; and by tracing it as the boundary, beyond the purchase on the nine-mile creek, to the top of the great iron mountain.
* * *

"Whatever doubt may have existed as to the Hawkins' line being the true Indian boundary independent of this treaty, there would seem to be no ground for doubt under the recognition of that line in this treaty. * * *

"And it is a sound principle of National law, and applies to the treaty-making power of this Government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the Government, within its constitutional power, neither the rights of a State nor those of individuals can be interposed. We think it was in the due exercise of the powers of the Executive and the Cherokee nation, in concluding the treaty of Tellico, to recognize in terms, or by acts, the boundary of the Holston treaty.

Lattimer vs. Poteet, 14 Peters, 12 and 14.

Thus this Court held that as the political branch of the government had, by the treaty of Tellico, placed such a construction on the treaty of Holston as to establish the

title of the Cherokees to the lands in dispute up to the Hawkins' line, this construction was conclusive on all parties. So we claim that as the executive and legislative branches of the government, by the treaty with the Tonawandas, have placed a construction upon the treaty of Buffalo Creek, which recognized the claims of the New York Indians to the Kansas lands, this construction is conclusive. And the language of Chief Justice Taney and Justice Catron, in their dissenting opinions in the case of *Lattimer vs. Poteet*, above cited, only strengthens our contention.

In the case of the *United States vs. Arredondo*, 6 Peters, 691, this Court, after expressly affirming the principle of *Foster and Elam vs. Neilson* (2 Peters, 307) as above, makes use of the following language at the end of page 713 :

"Where Congress has, by confirming the reports of Commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmation of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised; or which is to all intents and purposes of the same effect in law."

Thus when the President and Senate negotiated and ratified the treaty with the Tonawandas and Congress made the necessary appropriation to carry it into effect, it was a political and legislative construction of the terms of the treaty of Buffalo Creek, establishing the fact that that treaty vested title to the Kansas lands in the New York Indians, and that that title remained unimpaired.

These cases establish the proposition that where the course of the political branch of the Government has been such as to place a construction upon a treaty by which the title to disputed lands has been unequivocally recognized as being in the United States, this construction is conclusive upon the

courts of the United States. This has been the uniform ruling of this Court when the parties to the treaty were on an equal footing and when the construction was entirely in the interest of the United States.

Is not there very much more reason for this rule where the parties to the treaty are not on an equal footing, and where the United States has, both by executive and legislative action, unequivocally recognized a construction of the treaty, which disclaims title in the United States and acknowledges it to be in the weaker party to the treaty?

There can be no question that the treaty with the Tonawandas, followed by the appropriation to carry it into effect, fully recognizes the construction of the treaty we are maintaining in this case. The United States thereby acknowledged the validity of the treaty of Buffalo Creek, and that by that treaty title vested in the New York Indians, and that the Indians were also entitled to the \$400,000 agreed to be appropriated by Article 15 of the treaty. The United States not only thereby recognizes this construction, but pays a portion of the Indians in full.

The Attorney-General apparently recognizes the force of this position, for he attempts to show that the situation of the Tonawandas was different from the other New York Indians.

We respectfully submit that the facts establish that such difference as did exist, if any, was adverse to the rights of the Tonawandas rather than in their favor.

The records in this case, and in the case of *Fellows vs. Blacksmith*, which is by reference made a part of this case (see agreed statement, Record, p. 24), show that of all the protests that were made against the treaty none were more emphatic and far-reaching than those by the Tonawandas. They declared that they never owned any lands in Wisconsin, that they never were parties to the treaty of Buffalo

Creek, and that they never would remove West or from their own reservation. Every point that the Attorney-General urges against us in this case thus applies with particular force to the Tonawandas.

Not only that, but the particular point of difference that he attempts to make, to wit: that the United States had failed to make the appraisals of the improvements on the Tonawanda Reservation, is not well taken, for the facts as disclosed by the cases of *Fellows vs. Blacksmith and People vs. Dibble*, 21 How., 366, are that the United States appointed the Commission to make these appraisements, and this commission made frequent attempts to make the appraisements, but was prevented by force by the Tonawandas, and was finally forcibly conducted from the reservation and not allowed to return.

Whereupon, the testimony was taken just outside of the reservation, and the appraisals were made as accurately as could be done in this way and the return made, and the money was held for the use of the Tonawandas on the basis of that appraisalment.

Surely this absolute resistance and active opposition to the treaty did not give the Tonawandas any superior claim upon the United States.

Not only this, but the Tonawandas remained upon their reservation and refused to move off, although it was by the treaty to be surrendered to Ogden and Fellows, thus showing further resistance to the treaty.

As opposed to this, the Senecas residing on the Buffalo Creek Reservation peaceably acquiesced in the treaty—allowed the Commission to make the appraisals of their improvements, and quietly removed to the Cattaraugus and Alleghany Reservations. And the Indians of those reservations received them, thus greatly reducing the extent of their lands per capita, while the Tonawandas were not in-

convenienced in this way in the slightest and still retained, as a part of the Seneca Nation, their interest in the Cattaraugus and Alleghany Reservations.

It may be asked why then did the United States settle in full with the recalcitrant Tonawandas and allow the other Indians to go without compensation.

The answer is very simple : The other Indians were quiet and there was no emergency demanding an immediate settlement with them, while on the other hand, the Tonawandas, by their refusal to acquiesce in the treaty, were kept in a state of agitation by the Ogden Land Company, and the government was also urged on by that company to immediate action.

This being, therefore, the most urgent, received first consideration, but as shown in our briefs the government soon after took steps to settle with all the Indians and finally a treaty was negotiated with them in 1868 which was left in mid-air by the Act of Congress of March 3, 1871, 16 Statutes, 566, which put an end to any further dealings with Indians by treaty. This treaty of 1868, although it never became fully operative, was, we submit, a further executive recognition of the construction of the treaty of Buffalo Creek, in accordance with the contention of the appellants and in harmony with the construction placed upon it by the Tonawanda treaty.

There is nowhere in the record, nor in the history of the case, any action of the Executive or of Congress indicating a different view. Even opening the Kansas lands to settlement by proclamation of the President cannot be construed as adverse, for it is a well-known historical fact that these Kansas lands had at that time been largely occupied by squatters, and the policy of the government as to the removal of the Indians west, had long since changed, and the intention of the government to give the Indians a money

compensation for these lands had been already clearly expressed by the treaty with the Tonawandas.

In view of these unequivocal acts, how forced is the argument of the Attorney-General that the protests of the Indians against the treaty, and their declarations that they would not remove West which confessedly were not deemed sufficient to prevent the ratification and proclamation of the treaty, are to be considered as sufficient to justify the United States in failing to carry the treaty into full effect and to divest the Indians of their title to the Kansas lands.

The condition in the treaty that the Indians would remove West, moreover, became nugatory in 1844 when the policy of the United States as to the removal of the Indians was changed.

GUION MILLER,
GEORGE BARKER,
For the Appellants.

JOSEPH H. CHOATE,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
Of Counsel.

APPENDIX.

26th Congress.

(Confidential B.)

1st Session.

Message

From the President of the United States transmitting the amended treaty with the New York Indians and certain documents relating thereto.

January 14, 1840. Read with the treaty and documents, referred to the Committee on Indian Affairs.

January 15 1840. Ordered that the message, treaty and accompanying documents be printed in confidence for the use of the Senate.

The treaty with the New York Indians, as amended by the Senate and assented to by the several tribes in 1838, appears in the following form, beginning on page 40:

TREATY WITH THE NEW YORK INDIANS, AS AMENDED BY
THE SENATE AND ASSENTED TO BY THE SEVERAL TRIBES
IN 1838.

Articles of a Treaty made and concluded at Buffalo Creek in the State of New York the 15th day of January in the year of our Lord one thousand eight hundred and thirty-eight by Ransom H. Gillet, a Commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians assembled in council; Witnesseth,

Whereas the Six Nations of New York Indians not long after the close of the war of the Rebellion, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead

them to seek a new home among their red brethren in the west; and whereas this subject was agitated in a general council of the Six Nations as early as one thousand eight hundred and ten, and resulted in sending a memorial to the President of the United States inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there by gift or purchase whether the Government would acknowledge their title to the lands so

(End of page 40)

obtained in the same manner it had acknowledged it in those from whom they might receive it; and further whether the existing treaties would in such case remain in full force and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States purchases were made by the New York Indians from the Menominee and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menominee Indians concluded in February one thousand eight hundred and thirty one, to which the New York Indians gave their consent on the seventeenth day of October one thousand eight hundred and thirty-two: And whereas, by the provisions of that treaty five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St Regis tribes as a future home on condition that they all removed to the same within three years, or such reasonable time as the President should prescribe:

And whereas the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons that

many who were in favor of emigration preferred to remove at once to the Indian Territory, which they were fully persuaded was the only permanent and peaceable home for all the Indians, and they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory ; And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi within the Indian Territory by bringing them to see and feel by his justice and liberality that it is their true policy and for their interest to do so without delay :

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint :

GENERAL PROVISIONS.

Art. 1. The several tribes of the New York Indians, the names of whose chiefs, headmen and warriors and representatives are hereunto annexed, in consideration of the premises above recited and the covenants hereinafter contained to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menominee treaty of one thousand eight hundred and thirty one, excepting the following tract on which a part of the New York Indians now reside: Beginning at the southwesterly corner of the French grants at Green Bay and running thence southwardly to a point on a line to be run

from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands and being at right angles to the same.

(End of page 41)

Art. 2. In consideration of the above cession and relinquishment on the part of the tribes of the New York Indians and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country situated directly west of the State of Missouri as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the state of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the state of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary by running in line at right angles and parallel to the west line aforesaid to the Osage land, and thence easterly along the Osage and Cherokee lands to the place of beginning, to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians, as their numbers are at presented computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled, "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved

on the 28th day of May, one thousand eight hundred and thirty, with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other under such laws and regulations as may be adopted by the respective tribes acting for themselves or by a general council of the said New York Indians acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: the Senecas, Ondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns residing in the State of New York, and the same is to be divided equally among them according to their respective numbers, as mentioned in a schedule hereto annexed.

Art. 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the land so set apart, to the United States.

Art. 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guarantee to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them in said country the right to establish their own form of government, appoint their own officers and administer their own laws; subject, however, to the legislation of the Congress of the United States regulating trade and intercourse with the Indians: The lands secured to them by patent under this treaty shall never be included in any state or territory of this union. The said Indians shall also be entitled in all respects to the same political and civil rights and

privileges that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

(End of page 42.)

Art. 5. The Oneidas are to have their lands in the Indian Territory in the tract set apart for the New York Indians adjoining the Osage tract and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes whose lands are not specially designated in this treaty are to have such as shall be set apart by the President.

Art. 6. It is further agreed that the United States will pay to those who remove west at their new homes, all such annuities as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as part of this treaty.

Art. 7. It is expressly understood and agreed that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection by the President and Senate of the provisions thereof applicable to one tribe or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

Art. 8. It is stipulated and agreed that the accounts of the commissioner and the expenses incurred by him in holding a council with the New York Indians and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the state of New York in one thousand eight hundred and thirty-six, and those for the exploring party of the New York Indians in one thousand eight hundred and thirty-seven, and

also the expenses of the present treaty shall be allowed and settled according to former precedents.

SPECIAL PROVISION FOR THE ST. REGIS.

Art. 9. It is agreed with the American party of the St. Regis Indians that the United States will pay to the said tribe on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars as a remuneration for moneys laid out by the said tribe and for services rendered by their chiefs and agents in securing the title to the Green Bay lands and in removal to the same, the same to be apportioned out to the several claimants by the chiefs of the said party and a United States Commissioner, as may be deemed by them equitable and just. It is further agreed that the following reservation of lands shall be made to the Reverend Eleaser Williams of said tribe, which he claims in his own right and in that of his wife, which he is to hold in fee simple by patent from the President with full power to sell and dispose of the same, to wit: Beginning at a point in the west bank of Fox River, thirteen chains above the old mill dam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east two hundred chains; thence south fifty-two degrees and thirty minutes east two hundred and forty chains to the bank of Fox River; thence up along the bank of Fox River to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECA.

Art. 10. It is agreed with the Senecas that they shall have for themselves and their friends the Cayugas and Onondagas residing among them, the easterly part of the tract set apart for the New York Indians and to extend so far west as to include one half section, (three hundred and twenty

(End of page 43)

acres) of land for each soul of the Senecas, Cayugas and Onondagas residing among them; and if on removing west they find there is not sufficient timber on this tract for their use then the President shall add thereto timber lands sufficient for their accommodation and they agree to remove from the state of New York to their new homes within five years and to continue to reside there.

And whereas at the making of this treaty Thomas L. Ogden and Joseph Fellows, the assignees of the state of Massachusetts, have purchased of the Seneca nation of Indians in the presence and with the approbation of the United States Commissioner appointed by the United States to hold said treaty or convention, all the right, title, interest and claim of the Seneca nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed; And whereas, the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same to be disposed of as follows: The sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks for their use, the income of which is to be paid to them at their new homes annually and the balance being the sum of one hundred and two thousand dollars is to be paid to the owners of the improvements on the lands so deeded according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements to be made by appraisers hereafter to be appointed by the Seneca nation in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same according to said appraisal and award on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

Art. 11. The United States will set apart for the Cayugas on their removing to their new homes at the west, two thousand dollars and will invest the same in some safe stocks, the income of which shall be paid them annually at their new homes. The United States further agree to pay to the said nation on their removal west twenty-five hundred dollars to be disposed as the chiefs shall deem just and proper.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

Art. 12. The United States agree to set apart for the Onondagas residing on the Seneca reservations, two thousand five hundred dollars on their removing west and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes, and the United States further agrees to pay to the Onondagas on their removal to their new homes in the west two thousand dollars to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

Art. 13. The United States will pay the sum of four thousand dollars to be paid to Baptista Powlis and the chiefs of the first Christian party residing at Oneida; and the sum of two thousand dollars shall be paid to

(End of page 44)

William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian Territory as soon as they can make satisfactory arrangements with the Governor of the State of New York, for the purchase of their lands at Oneida.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

Art. 14. The Tuscarora nation agree to accept the country set apart for them in the Indian Territory and to remove there within five years, and to continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country at the forks of the Neosho River; which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation on their settling at the West three thousand dollars to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns in fee simple five thousand acres of land lying in Niagara County in the State of New York which was conveyed to the nation by Henry Dearborn, and they wish to sell and convey the same before they remove west;

Now, therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States to be held in trust for them; and they authorize the President to sell and convey the same, and the money which shall be received from said land exclusive of improvements, the President shall invest in safe stocks for their benefit, the income of which shall be paid to the nation at their new homes annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised and shall not be sold at a less price than the appraisal without the consent of James Cusick, William Mountpleasant, and William Chew, or the survivor or survivors of

them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before their investment.

And Whereas at the making of this treaty Thomas L. Ogden and Joseph Fellows, the assignees of the state of Massachusetts, have purchased of the Tuscarora nation of Indians in the presence and with the approbation of the Commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas the consideration money for said lands has been secured to the said nation to their satisfaction by Thomas L. Ogden and Joseph Fellows; therefore, the United States hereby assent to the said sale and conveyance and sanction the same.

Art. 15. The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions as it may be most for the interests of the said Indians, parties to this

(End of page 45)

treaty, for the following purposes, to-wit: To aid them in removing to their homes and supporting themselves the first year after their removal; to encourage and assist them in education and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof the Commissioner and the chiefs headmen, and people, whose names are hereto annexed, being duly authorized have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

Signed: R. H. GILLET Seal.

Commissioner

Then follow (constituting pages 46 to 59 in "Confidential B."), the signatures of the Indians; schedules A. B. and C.; the conveyances by the Senecas and Tuscaroras to Ogden and Fellows; the supplemental article to the treaty on the part of the St Regis Indians, and the assents of the various tribes, all as they appear in the 7th Statutes, except that to the assent of the Seneca Nation the following portion, which appears in 7th Statutes at page 562, is not attached, namely, "Little Johnson, Samuel Wilson, John Buck, William Cass, Long Johnm, Sky Carrier, Charles Greybeard, John Hutchinson, Charles F. Pierce, John Snow.

These ten chiefs signed in my presence except the last, John Snow.

(Signed): H. A. S. DEARBORN,
Superintendent, Mass.

Signed in the presence of—Nathaniel F. Strong, United States interpreter, James Stryker, United States agent.

George Kenquide, by his attorneys N. T. Strong, White Seneca. The signature of George Kenquide was added by his attorneys in our presence—R. H. Gillet, James Stryker. 18th January 1839.

On page 68 appears the following :

" No. 8.

Washington, January 11th 1839.

Sir:

I have the honor herewith to hand you a copy of the treaty of January 15th 1838 with the New York Indians, as amended by the resolutions of the Senate of the 11th of June last, together with the assents of those obtained to those amendments. You have heretofore received a full report of all that transpired prior to your instructions of the 30th of October last. On the receipt of those instructions I repaired to Buffalo, New York for the purpose of carrying

them into effect. On my arrival there I was joined by General H. A. S. Dearborn, the Superintendent appointed by the Governor of Massachusetts who continued with me until the close of my visit there. He was present and witnessed every signature to the assent except one which was taken while he was confined to his room by indisposition.

Soon after my arrival at Buffalo I directed the United States sub-agent resident there to give public notice to the Seneca chiefs that I was present and authorized to receive the signatures of such

(End of page 68)

of their chiefs as desired to give them, and that the Superintendent for Massachusetts was also present to discharge the duty assigned him by the authorities of his State. After this notice ten additional names were received to the Seneca assent, making in all forty-one. Seven of these ten had previously signed separate assents containing powers of attorney to execute such further papers as might be necessary to give validity to their assents. These papers were all approved and acknowledged according to the usual forms under the laws of New York. Five of this number personally came before me and signed the assent attached to the treaty. The other two signed by attorney. The reasons why they did not appear and sign in person are stated in two affidavits which I hand you marked No. 1 and No. 2. From the character of the affidavits and the information verbally communicated to me by several respectable chiefs, I have no doubt that the affidavits are strictly true.

According to the statement of the Honorable James Stryker, Sub-agent of the New York Indians, dated March 29th, 1838, now in your office, and the further statement of the seven Seneca delegates who were then here, there were at that time in all eighty one Seneca chiefs. To this com-

munication of Judge Stryker is added a communication containing the names of the chiefs. Subsequently three of these chiefs, to wit, George White, Captain Jones and Captain Jack Snow, died as appears by two affidavits of persons known to me to be respectable, marked No. 3. Their places have been filled by Charles Greybeard, John Hutchinson and Charles F. Pierce, as appears by three communications which I hand you marked No. 4, No. 5 and No. 6.

From the high character of the principal chiefs whose names are signed to the first two of these papers, I place implicit confidence in their statements and I have no reason to doubt that they have truly stated the facts relative to the official character of these men. To these four names may be added that of James Shongo, who signed the assent attached to the printed copy of the treaty now in your possession, making in all forty two names, being a majority of three. Without the name of James Shongo there is a majority of one.

In every instance where a signature was received either General Dearborn or I distinctly inquired of the person offering to sign whether he fully understood the subject and whether he freely and voluntarily signed the assent. In each case distinct affirmative answer was given.

I visited such places on the reservation as I was desired to by any of the chiefs. Eight of the signatures were received at my lodgings in Buffalo, one at my former lodgings on the Buffalo Creek reservation and one at the residence of the sub-agent.

This, in connection with my former report constitutes all the facts known to me which are relevant and at all important to a right understanding of this subject. They will enable you to pass upon all the points which I think can properly grow out of it. I take the liberty of suggesting that in considering the subject it may be proper to advert to a com-

munication of James S. Wadsworth Esquire to me, now on file in your office, in which he distinctly offers life leases to all who desire them. This in effect, so far as the purchasers are concerned, change the character of the transaction and makes the arrangement substantially one with the emigration party alone. All removals under it will be voluntary and all who desire to spend their days on the land now occupied by them can do so. The rising generation, however, would not be embraced in the

(End of page 69)

provisions of that proposition and would have to seek homes in their new country. I have not that communication before me and consequently speak from memory. If I am in error as to its contents you can, by reference to it, correct me. How much importance should be attached to this consideration you can best determine.

Prior to leaving Buffalo I received a message from the venerable Captain Pollard who is confined to his bed by an excruciating disease, desiring me to come to see him. The character of this man is described by Col. Stone, the biographer of Joseph Brant, in a letter published in December number of the Democratic Review. For bravery in war, wisdom in council and honesty and integrity in all the transactions of life Captain Pollard has no superior among the New York Indians and probably not in the tribes on the continent. I give you this description of him because he desires me to communicate to you the talk which he made me when I visited him, which I did a day or two before I left in company with the United States interpreter, N. T. Strong a Seneca chief. I found him unable to leave his bed but his mind seemed to be as lucid and vigorous. I have reduced this communication as far as memory will permit to writing and attach it to this report. It is due to

me that his speech has lost much of its force and attractiveness by being translated and spread upon paper. I will only add that his reasons carry conviction to my mind which further reflection has not effaced.

While on the Buffalo reservation a Cayuga agent, who was confined to his house by sickness, desired permission to place his name on the Cayuga assent which I had with me. I permitted him to do so and the names of James Young, the head chief of the Cayuga Nation, will be found to that paper in his own handwriting.

I understood another Cayuga chief wished to add his name also but I did not see him and consequently he had no opportunity to do so.

While at Buffalo General Dearborn showed me a letter from Governor Everett relative to the mode in which I had been instructed to perform my official duty and desired me to give him my views on the points which had been raised. You have doubtless received a copy of the Governor's letter. Although my letter to General Dearborn was not official, still I think you ought to know its contents, and therefore I hand a copy of it to you, and it is marked No. 7.

Your obedient servant,

R. H. GILLET.

To Hon. T. HARTLEY CRAWFORD,

Commissioner of Indian Affairs.

(Then follows the substance of a talk by Capt. Pollard which occupies the remainder of pages 70, 71 and 72 of "Confidential B.," and at the top of page 73 appears the following :)

The treaty as amended was enclosed herewith, with the following additional signatures :

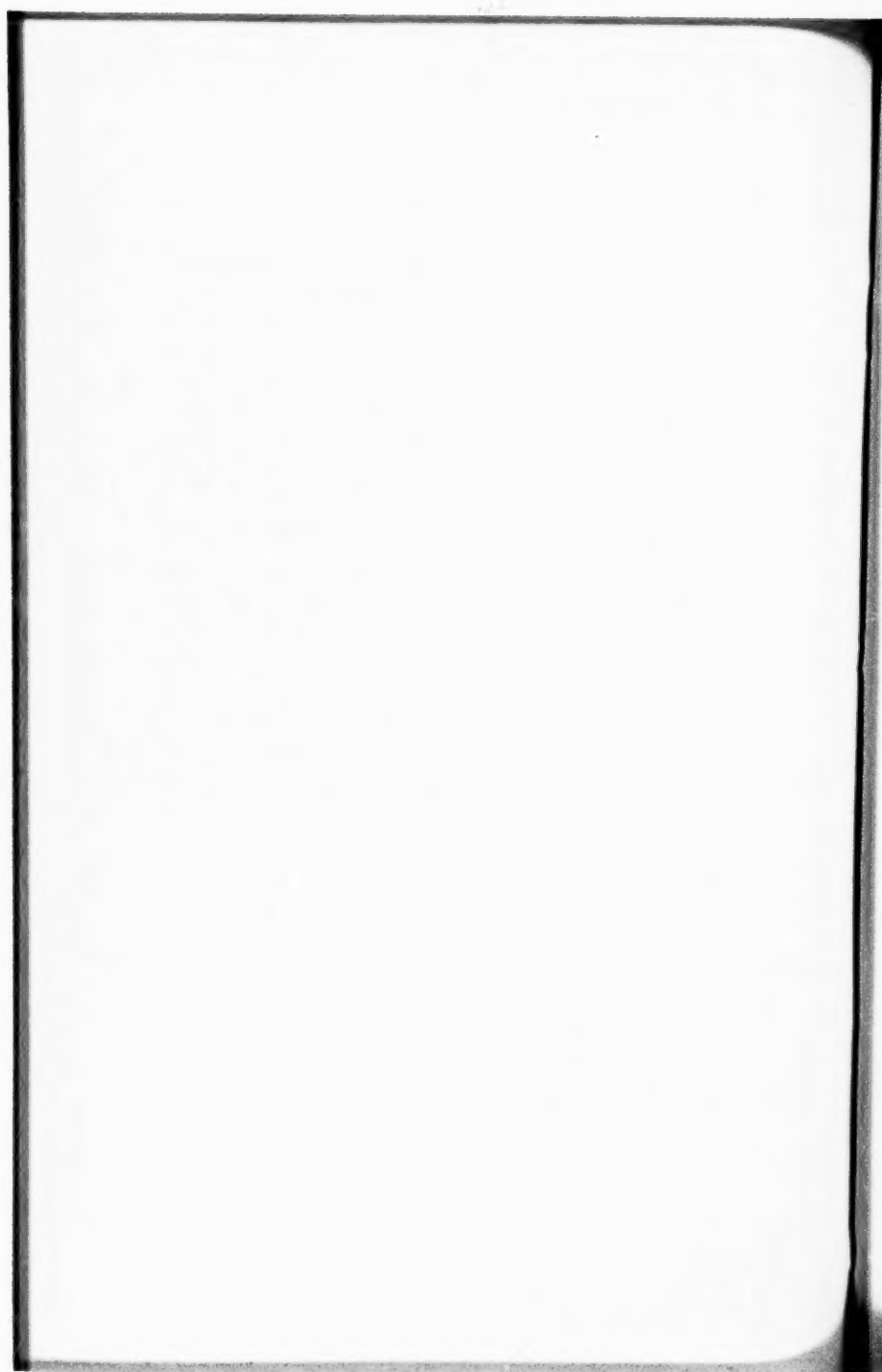
Senecas :	LITTLE JOHNSON	His × mark.
	SAMUEL WILSON	His × mark
	JOHN BARK	His × mark
	WILLIAM CROSS	His × mark
	LONG JOHN	His × mark
	SKY CARRIER	His × mark
	CHARLES GREYBEARD	His × mark
	JOHN HUTCHINSON	His × mark
	CHARLES PIERCE	
	JOHN SNOW	His × mark.

These ten chiefs signed in my presence except the last John Snow. H. A. S. Dearborn Superintendent of Mass. Signed in the presence of Nathaniel T. Strong, U. S. Interpreter, James Stryker, U. S. Agent.

GEORGE KENJUQUIDE	His × mark
By his attorneys N. T. STRONG and WHITE SENECA	His × mark.

The signature of George Kenquide was added by his attorneys in our presence.

R. H. GILLET, JAMES STRYKER.
18th of January 1839.
Cayuga. JAMES YOUNG.



N^o 106.

FILED,
MAR 2 1898
JAMES H. MCKENNEY

Ad^r. By. of Davis, & Miller, Choate
Barker, Jenkins & McGowan for
Supreme Court of the United States. Appts.

Filed Mar. 2, 1898.
NO. 106.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES, RESPONDENT.

POINTS ON THE QUESTION OF ABANDONMENT

HENRY E. DAVIS,

GUION MILLER,

For the Appellants.

JOSEPH H. CHOATE,

GEORGE BARKER,

JAMES B. JENKINS,

JONAS H. MCGOWAN,

Of Counsel.



Supreme Court of the United States.

NO. 864.

THE NEW YORK INDIANS, APPELLANTS,

v.s.

THE UNITED STATES, RESPONDENT.

BRIEF ON ABANDONMENT, BY APPELLANT.

The following points were made on the oral argument on the first hearing, and are now printed and re-presented in this form for the convenience of the Court and Counsel.

FIRST.

The Court below dismissed the appellants' petition upon the ground, that they had abandoned all the rights and interests secured to them under the treaty of 1838.

This appears in the opinion of the Court as printed in the case. It is manifest that this was the ground of its determination from the reasons assigned in the opinion.

The finding of fact made by the Court of Claims, that the President never fixed a time for the Indians to remove, either before or after the expiration of five years, after the ratification of the treaty, and its conclusion as matter of law, that no forfeiture had been incurred, clearly indicates that this was the ground of its decision.

The legal conclusion of the Court below, that a case had been made of abandonment by the Indians of their interests in the Kansas lands, is erroneous and wholly unsupported by the facts and circumstances of the case.

The material question to be determined in all cases of alleged abandonment is one of intention, and unless it is determined as a fact, that the party intended forever to give up and abandon his estate, right or interest in the lands secured to him by the deed, or other instrument in writing, he has not lost the same.

A complete abandonment includes both the intention of the party to abandon, and the external act by which his intention is carried into effect.

The common law doctrine of abandonment is applied only to incorporeal hereditaments, such as right of way and other easements, and has no just applications where the party has acquired a free-hold estate by grant or by any instrument in form, in compliance with the law of the state where the land is situated.

- 3 Washburn on Real Estate. Title abandonment
- White vs. Crawford, 10 Mass., 183.
- Barnum vs. Anger, 2 Allen, 128.
- Wenn vs. Field, 102 Mass., 224.
- White's Bank of Buffalo vs. Nichols, 64 N. Y., 65.
- Hayford vs. Spokesfield, 100 Mass., 491.
- Barnes vs. Lloyd, 112 Mass., 224.
- 1 Am. & Eng. Enc. of Law, p. 21.

The rule may be stated as broadly as this, that in no case can a man lose a title to a free-hold estate in land by any act or oral declaration, unless it comes within the category of estoppel, or is followed by such an attitude by the person claiming the title thereto, so as to bring the case within the statute of limitations.

- Washburn on Real Estate, Vol. 3, page 65. Title abandonment.
- School District vs. Benson, 31 Maine, 381.
- Tolman vs. Sparhawk, 3 Met., 476.
- Welland Canal Co. vs. Hathaway, 8 Wendell, N. Y., 480.

We feel assured that in this case no rule will be applied less favorable to the claimants, than the one applicable to individual suitors, by the rule of the common law.

SECOND.

The fact has not been found by the Court below, that the claimants collectively, or any one of the nations separately, intended to abandon and give up their estates, rights and interests in the Kansas lands; nor is any circumstance mentioned that tends to prove the existence of such an intention. Nor is any act of the claimants set forth in the findings, which carried such intention into effect, if one ever existed.

An act not accompanied by an actual intent to abandon and give up the estate or interest of a party in lands, is not sufficient in law to effect a loss of his property rights in lands; nor will an intention to abandon, not accompanied by some external act, which plainly and unmistakably indicates an intention to abandon, be sufficient to re-invest the grantor or donor with his former title.

If these propositions are not sound, then an intention to abandon without doing anything to carry such intention out, or the doing of some act without any intention to abandon and give up his right, would result in the loss of the party's estate.

THIRD.

The treaty of 1838, was negotiated between the United States and the several tribes or nations composing the Six Nations of New York Indians, and not with the individual members of the respective tribes.

This feature of the treaty is controlling on the question of abandonment, and is a complete answer to the contention on the part of the United States, that the several nations parties to the treaty have abandoned their estate in the lands in question, described in the second article.

This view of the treaty the counsel for the appellants urge upon the attention of the Court as a correct interpretation of that instrument and unanswerable.

The Government from the time of its earliest negotiations and dealings with the Indian Tribes treated them as organized communities, possessing such features of nationality that they could rightfully in the name which they have assumed, negotiate treaties and make contracts with the United States.

They are denominated in the history of the country as "Domestic Dependent Nations."

This Court has decided that the treaty of 1838, was negotiated with the respective nations or tribes of the New York Indians, and not with the individual members of those tribes.

Blacksmith vs. Fellows, 19 How., 366.

The attorney general does not dispute the correctness of this construction.

All the promises and stipulations are by and with the several nations in their tribal capacity. The last paragraph of the preamble confirms our views and is as follows:

"Therefore, taking into consideration the foregoing premises, the following articles of the treaty are entered into between the United States of America, and the several tribes of New York Indians, the names of whose chiefs, head men, and warriors are hereto subscribed."

The clause releasing to the United States the Wisconsin lands, is made by the Indians in their tribal capacity, and not by any one or more of them as individuals. (See article 1.)

The grant to the Indians of the Kansas lands was to them in these words: "To have and to hold the same in fee simple to the said tribes or nation of Indians." (See article 2.)

All the other stipulations in the treaty are with the respective nations or tribes, except the provision in the 9th article setting apart a tract of land to Eliazer Williams, who was a white man and a missionary, and the promises to pay a few Indians small sums of money; and their names and the sums to be paid are stated in schedule B and C annexed to the treaty. The conditions annexed to the treaty by the Senate by resolution adopted on the 11th day of June, 1838, the day the treaty was ratified by the Senate, which are set forth in the last paragraph

of finding 10, apply to the Indians in their tribal capacity and not as individuals.

The last paragraph is in these words, "provided further, that if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of \$400,000, and shall also deduct from the quantity of land allowed west of the Mississippi, such number of acres as will leave to each emigrant 320 acres, only."

This provision did not vest in any individual Indian any title to any part or portion of the Kansas Reservation, but the same was intended to lessen the number of acres to be included in the reservation set apart to the nations or tribes, if any one or more of the Indians should not emigrate after a proper notice to the nation or tribe to which they belonged.

Indians acting individually cannot effect an abandonment of the property right of the nation of which they are members, any more than a citizen or body of citizens can by their speech and doings, deprive the United States of property rights and interest in lands, acquired by treaty with a foreign power. This is a self evident proposition.

A. None of the nations or tribes of Indians acting in their tribal capacity in accordance with their customs and form of government, have declared their intention to abandon the Kansas lands, or done any act indicating such purpose. A careful perusal of the record will verify this statement.

All the declarations, protests, disclaimers and statements set forth in the record on which the Government relies and put forth on the argument of abandonment were made by individual Indians, and their number is not given nor the time or place where they were made.

For convenience, all the findings on this subject are here brought together. In the last paragraph of the 5th finding is this statement: "March 14th, 1840, the Senecas denied ownership in the Wisconsin lands, stating that they determined to have no other home than that of their fathers, where they then resided, and in May and September following, in petition

to the President, the Senate, and the House of Representatives, the counsel denied that they were parties to the treaty."

The first fact stated therein is immaterial, as the statement was made before the treaty had been proclaimed by the President, and the other fact mentioned related to a question not now in dispute, and was a mere denial that the Senecas were parties to the treaty of 1838, which is not now an open question.

In finding No. 11, the protests there mentioned were made by individual Indians. And it is found in the same finding that they were made before the treaty of 1842 was negotiated, which was an amendment to the treaty of 1838, and was accepted by the Indians as a final ending of all the questions in dispute.

We may now refer to some of the most significant acts on the part of the claimants and the United States, showing that neither party was of the opinion that the treaty of 1838 had been abandoned.

(1) The Indians surrendered up to the United States all the then Wisconsin reservation.

(2) In the 11th finding it is stated as a fact that prior to the 24th of November, 1845, some of the New York Indians had applied to the Indian office for proper steps to be taken for their removal and that the Government made an appropriation of money to aid in the removal and appointed a commissioner to superintend the same, and on June 15th, 1845, a portion of the Indians were located on the Kansas reservation. The details of the action of the Government are set forth in this finding.

(3) After the treaty of 1842, the Seneca Nation gave up to Ogden and Fellows, their grantees, the Buffalo Creek reservation, which was of great value. (See the last finding in paragraph 11.)

(4) In 1857, the treaty with the Tonawanda Indians, a band of the Seneca Nation, was negotiated and the United States agreed to pay, and did pay \$256,000, for a release of the interest of this band in the Kansas lands. (See accompanying memo-

randum, as to the action of the Indians and the United States under this treaty.)

(5) Prior to March 21, 1859, the date of the order of the Secretary of the Interior, directing the New York Indian reservation in Kansas to be surveyed, with a view of making the same a part of the public domain, the United States had not in any way or manner claimed or acted on the supposition that the Indians had lost their title to their land by abandonment.

(6) After the promulgation of this order, and before the President made proclamation that these lands were a part of the public domain, and in the year 1860, the Indians protested that the intention of the United States to make these lands a part of the public domain, was contrary to the obligations of the United States, under the treaty of 1838, and employed counsel to present their grievances in this respect, to the proper department of the Government. (See finding 17.)

In view of all these undisputed facts and circumstances, we contend that abandonment has not been established; on the contrary, we confidently submit that they prove, that an intention to abandon was never entertained by the claimants.

FOURTH.

The 13th finding is in these words:

"A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscororas, was called by the Indian Commissioner to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The Commissioner who was sent on the part of the United States, reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The Commissioner also reported that he held an enrollment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as wishing to go."

The circumstances therein stated do not indicate that either of the tribes therein mentioned, or any individual Indians

referred to, had an intention to abandon their interests in the Kansas reservation.

The Commissioner did not make and conclude with the Indians then present, any arrangement relative to removal, nor does it appear that he was authorized to do so.

We are unable to ascertain from this finding the sentiment entertained by the chiefs themselves who were present, on the subject of abandonment, or as to their own views on the subject of removal. The Commissioner did not report what the chiefs said to him on that subject. He simply stated in his report, that the chiefs were of the opinion, "that scarcely any Indians who wished to emigrate remained." This is in effect an assertion by the chiefs to the Commissioner, that a portion of the Indians did desire to emigrate. Accepting what the Commissioner said about removal as true, it does not furnish any reliable information as to the real mind of the people on the subject of emigration.

At the time the council was held, the Seneca nation numbered 2,633, including the Cayugas and Onondagas residing with them, and the Tuscororas, 273; in all 2,906 souls. (See schedule A, annexed to the treaty of 1838.)

It cannot be determined from the finding how many of this large number of Indians interested in the subject of emigration, were present when the Commissioner made his canvass.

The Court will take judicial notice of the fact, that the Tuscororas' reservation is located 60 miles from the place appointed for the council. The phrase of the Commissioner that, "the meeting was well attended," does not inform us how many individual Indians he met face to face during the council.

The whole finding is worthless and unreliable, in considering the question under consideration. This further fact may be stated, that the treaty of 1838 was signed by 44 head men and chiefs and people, and the treaty of 1842 by 32 chiefs of that tribe, and 17 Tuscorora chiefs signed the treaty of 1838. (See the Treaty.)

The number of chiefs present at this council was not stated by the Commissioner in his report, and the same would be correct if there were two and no more present, and they all from the same Nation.

The Commissioner of Indian Affairs, without direction from the President, had no power to negotiate on any question relative to the rights of the Indians in the Kansas Reservation.

While the council was in session, the Government under the supervision of a Commissioner, was conducting an emigrating party to the Kansas reservation, which conclusively indicates that the Indians had not abandoned their title to the Kansas Reservation, and that the Government did not suppose they had. (See finding 12.)

HENRY E. DAVIS,

GUION MILLER,

For the Appellants.

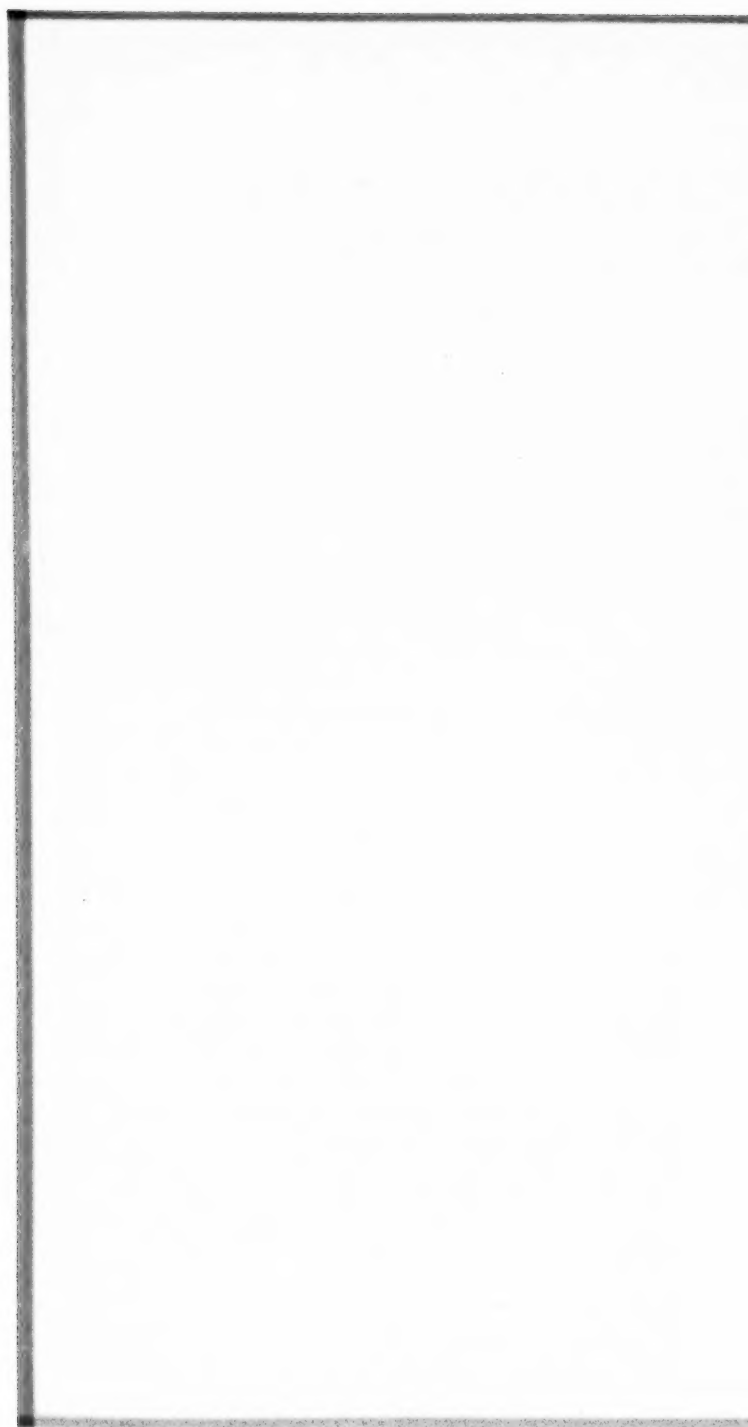
JOSEPH H. CHOATE,

GEORGE BARKER,

JAMES B. JENKINS.

JONAS H. MCGOWAN,

Of Counsel.



N. 106.

MAR 2 1898
JAMES H. MCKENNEY,
CLERK

*Ex. of Davis, Miller, Choate,
Barker, Jenkins & Ch. Gowan for
Appeals (on rearg.)*

SUPREME COURT
Filed Nov. 2, 1898.
UNITED STATES.

OCTOBER TERM, 1896.

No. ~~115~~ 106.

THE NEW YORK INDIANS, APPELLANTS,

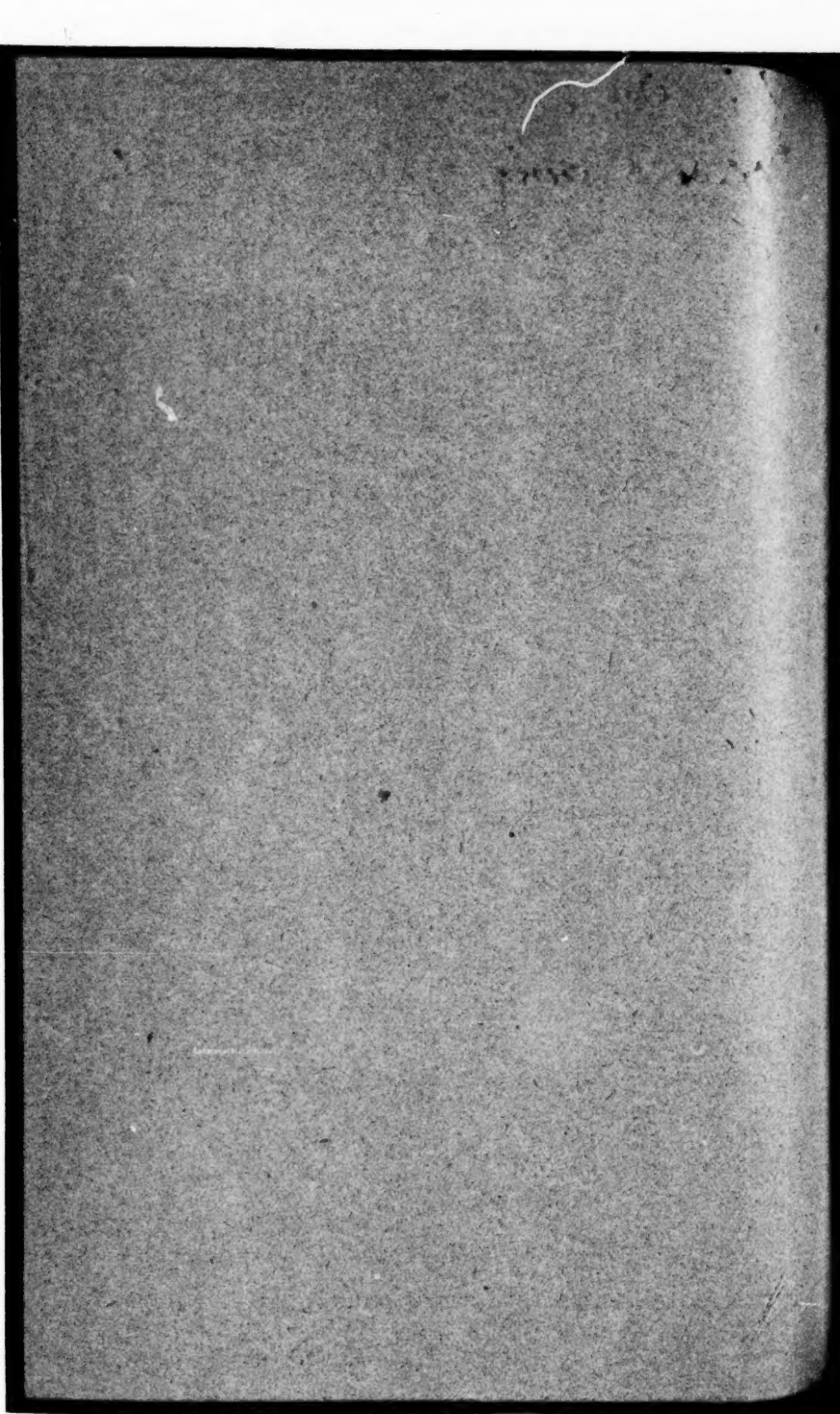
vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR APPELLANTS ON REARGUMENT.

HENRY E. DAVIS,
GUION MILLER,
For the Appellants.

JOSEPH H. CHOATE,
GEORGE BARKER,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
Of Counsel.



IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

ADDITIONAL BRIEF FOR APPELLANTS ON REARGUMENT.

I.

Was the treaty of Buffalo Creek of January 15, 1838, between the United States and the appellants duly ratified by the United States Senate, and proclaimed by the President of the United States?

And was the treaty thereafter recognized by both of the parties thereto as binding on them and governing their relations and obligations to one another?

A brief and concise statement of the action of the Executive, Legislative and Judicial Departments of the Government, in recognition of the existence and validity of the treaty of January 15, 1838, will be given from the time of its final consideration by the United States Senate, and its ratification by the Senate, and its proclamation by the President, to the passage of the Enabling Act, January 22, 1893, giving this Court jurisdiction to review the action of the Court of Claims, and determine the justice and validity of the appellants' claim.

In making such reference to statutes, and documents, we shall do so in their chronological order, and care will be taken in making extracts therefrom, and to state the occasion and purpose of such action, to indicate their significance.

II.

March 2, 1839.

It appears from the Executive Journal of this date that the Senate, by a two-thirds vote, adopted the following resolution: (See Record Finding 10, pp. 10 to 18.)

“Resolved, That whenever the President of the United States shall be satisfied that the assent of the Seneca Tribe of Indians has been given to the amended treaty of June 11, 1838, with the New York Indians, according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommends that the President make proclamation of the said treaty and carry the same into effect.”

On the passage of said resolution the following order was made, viz.:

" *Ordered*, That the Secretary lay the said resolution
 " and the treaty transmitted to the Senate with the mes-
 " sage of the 22d of January last, before the President of
 " the United States."

2.

March 25, 1840.

It appears from the same Senate Journal of this date
 that the United States Senate passed the following resolu-
 tion :

" *Resolved*, That in the opinion of the Senate, the treaty
 " between the United States and the Six Nations of New
 " York Indians, together with the amendments proposed
 " by the Senate of the 11th of June, 1838, have been satis-
 " factorily acceded to, and approved of by said tribes, the
 " Seneca Tribe included, and that in the opinion of the
 " Senate the President is authorized to proclaim the treaty
 " as in full force and operation.

" Attest : ASBURY DICKINS, Secretary."

(See Record, p. 31.)

3.

April 4, 1840.

All the Indian parties to said treaty, having " acceded
 to, and approved of the treaty with the amendments pro-
 posed by the Senate of the 11th of June, 1838," the Presi-
 dent, in pursuance of said Senate Resolution, on this day
 made " Proclamation of the Treaty of Buffalo Creek" in the
 following language, viz : (See Record, p. 17.)

" Martin VanBuren, President of the United States of
 " America, to all and singular to whom these presents shall
 " come,

" GREETING :

" Whereas, a treaty was made and concluded at Buffalo,
 " in the State of New York, on the 15th day of January,
 " one thousand eight hundred and thirty-eight, by Ransom
 " H. Gillet, a Commissioner on the part of the United
 " States, and the Chiefs, head men and warriors of the
 " several tribes of the New York Indians, assembled in
 " council ;

" And whereas, the Senate did, by a resolution of the
 " 11th of June, one thousand eight hundred and thirty-
 " eight, advise and consent to a ratification of said treaty
 " with certain amendments, which treaty, so amended, is
 " word for word as follows, to wit : * * * *

" And whereas the Senate did, on the 25th of March,
 " one thousand eight hundred and forty, resolve ' that in
 " the opinion of the Senate, the treaty between the United
 " States and the Six Nations of New York Indians, together
 " with the amendments proposed by the Senate of the 11th
 " of June, 1838, have been satisfactorily acceded to and
 " approved of by said tribes, the Seneca Tribe included, and
 " that in the opinion of the Senate the President is author-
 " ized to proclaim the treaty as in full force and opera-
 " tion.'

" Now, therefore, be it known that I, Martin Van
 " Buren, President of the United States of America, do,
 " in pursuance of the resolution of the Senate of the 11th
 " of June, one thousand eight hundred and thirty-
 " eight, and 25th day of March, one thousand eight
 " hundred and forty, accept, ratify and confirm said treaty
 " and every article and clause thereof.

" In testimony whereof I have caused the seal of the
 " United States to be hereunto affixed, having signed the
 " same with my hand.

" Done at this City of Washington, this 4th day of April,
 " one thousand eight hundred and forty, and of the Inde-
 " pendency of the United States the sixty-third.

" By the President, M. VANBUREN.

[SEAL]

" JOHN FORSYTH,

" Secretary of State."

4.

April 4, 1840.

This treaty, on this day, became the supreme law of the land, made so by the constitution of the United States, behind which courts can not go.

The treaty became a corporal part of the 7th Vol. U. S. Statutes at Large. We then have the further proof—if statutes are not to be ignored—that the treaty, as amended, was signed by the parties, attested by various witnesses, assented to by the Six Nations, *separately*: By the Senecas, September 28, 1838; by the Oneidas, August 9, 1838, for themselves and their parties; the Tuscaroras, August 14, 1838; the Cayugas, August 30, 1838; the St. Regis, October 9, 1838; the Onondagas, August 21, 1838. (7 Statutes, 559 to 564.)

5.

After the ratification of this treaty of Buffalo Creek, the New York Indians—there being 1,300 of them in possession of the Green Bay lands—withdrew to the reservation of 65,000 acres, reserved in Article 1st of said treaty, and delivered up 500,000 acres of land to the United States. Thereupon the United States surveyed, made part of the public domain, and sold, or otherwise disposed of, and conveyed the same, and received the consideration therefor. (Record findings 14, 15, p. 20.)

Each party to the treaty recognized the validity of the treaty—the one in surrendering the possession of the lands they had ceded, and the other by accepting, receiving, surveying and selling the same, and receiving and appropriating the proceeds thereof.

6.

May 20, 1842.

Questions and differences having arisen between the Chiefs and head men of the Seneca Nation of Indians, *or some of them* (7 Stat. 587) for the purpose of a settlement thereof a treaty was made and concluded on this day between the United States and the Seneca Nations, one of the parties to the treaty of Buffalo Creek, in reference to some of the provisions of that treaty in which the treaty of Buffalo Creek was referred to “as having been duly ratified” in the following language, viz.:

“Whereas, a treaty was heretofore concluded, and made
“between the said United States, and the chiefs, headmen
“and warriors of the several tribes of New York Indians,
“dated the 15th day of January, in the year one thousand
“eight hundred and thirty-eight, which treaty having
“been afterwards amended was proclaimed by the President of the United States, on the 4th of April, one thousand eight hundred and forty, *to have been duly ratified.*”
(7 Stat. 586, preamble.)

The said treaty of Buffalo Creek is further recognized, and held valid as modified in articles “Second and Third,” (p. 590, 7 Stat.)

By the said treaty of May 20, 1842, which was ratified, confirmed and proclaimed August 26, 1842, harmony was restored, and all the tribes were fully satisfied. Thereafter no protest was made by the Indians against the treaty of

1838. (See Finding 11.) The treaty of 1842, thus recognized the validity of the treaty of 1838, as having been duly ratified.

7.

The United States, for the purpose of carrying out the provisions of these treaties, caused a tract of land in the then Indian Territory, (now the State of Kansas) to be surveyed, marked, and set apart to the New York Indians, containing, as supposed, 1,824,000 acres of land, and being 320 acres for each soul of the New York Indians, "residing in the State of New York and in Wisconsin, or elsewhere in the United States." (Art. 2, 7 Stat. p. 551.) These lands were designated upon the maps of said survey, filed in the War Department, "The New York Indian Reserve." This was a further declaration of the validity of the treaty of 1838.

8.

June 7, 1842.

The Commissioner making the treaty of May 20, 1842—Hon. Ambrose Spencer—made his report, dated May 23d, to T. Hartley Crawford, Commissioner of Indian Affairs, with the treaty annexed, approved therein of the treaty of January 15, 1838, and declared the same, except as modified by the treaty of May 20, 1842, *as remaining in full force*.

On this day, June 7th, the Commissioner of Indian Affairs transmitted the same to Hon. John C. Spencer, Secretary of War, with his report, in which he recognizes the validity of the treaty of January 15, 1838, and among other things he says, referring to said treaty, viz :

"The United States, in having undertaken to pay a large sum money, and to appropriate an extensive tract

“ of country west of Missouri by the treaty of 1838, which,
 “ except as modified by the arrangements now submitted, *will*
 “ *remain in force.*”

On the day following, and June 8, the Secretary of War transmitted said reports to the President of the United States. In concluding his communication he said :

“ The accompanying report of the Commissioner on the
 “ part of the United States, by whom the treaty was
 “ negotiated and concluded, and the communication of
 “ the Commissioner of Indian Affairs so fully explain the
 “ *fairness* of the transaction and the operation of the treaty
 “ upon the interests of the United States, that I do not
 “ deem it necessary to add any remarks of my own, except
 “ to express the great gratification felt that the negotiation
 “ which has resulted in this treaty has been conducted
 “ in a manner so honorable and so just.” (See Record in
 Court of Claims, p. 155 and 156. The Commissioner of
 Indian Affairs' Report of June 7, 1842, to the Secretary
 of War.)

9.

March 3, 1843.

Prior to this date “Indians of the Seneca, Cayuga and
 “ Onondaga Tribes applied for removal to their new
 “ homes.” In pursuance thereof, on the day last aforesaid,
 Congress, for the purpose of carrying out the provisions of
 the treaty of January 15, 1838, passed an act, which was
 approved by the President and became a law, in the fol-
 lowing words, to wit :

“ An act for the removal to the west of the Mississippi
 “ of two hundred and fifty of the New York Indi-
 “ ans, of the Seneca, Cayuga and Onondaga Tribes,
 “ and for fulfilling other treaty stipulations with them

“ provided that so many are willing to emigrate, for the
 “ said half calendar year, twenty thousand four hundred
 “ and seventy-seven dollars and fifty cents.” (Sec. 5 Stat.
 612. Record p. 21, finding 18. Sen. Doc. 13, 34 Cong.,
 3d Session.)

It is seen that three years after the ratification of the treaty both parties to it recognized its validity, and its binding obligations on them.

10.

September 12, 1845.

The President appointed Dr. Abraham Hogeboom an agent for the removal of the Indians to Kansas, for the purpose of carrying out the provisions of the treaty of 1838. (See Record, p. 19, finding 12. Report of H. Price, Commissioner of Indian Affairs, to the Secretary of the Interior, Feb. 9, 1883, found 1st Recl. Court of Claims, p. 169, 171.) The agent started in the spring of 1846, with a party of about 200 Indians, arriving in Kansas, June 15, 1846. The sum of \$9,464.08 was expended in the removal of the party.

Again, we notice that after the laps of the first five years, each party to the treaty once more acknowledged the validity and binding force of that treaty. (Record 19, finding 12.)

11.

November 24, 1845.

“ Prior to this date, some of the New York Indians had
 “ applied to the Indian office for the proper steps to be
 “ taken for their emigration. It was not deemed expedi-
 “ ent to enter into any arrangements for this purpose then,
 “ etc.” (Record, p. 19, finding 12. Sen. Doc. 13, 34th
 Cong. 3d Session.)

June 27, 1846.

For the further purpose of carrying out the provisions of the treaty of 1838, Congress passed a law, which is in the following words: An act "For the payment to the " American party of St. Regis Indians, stipulated in supplemental article to the treaty with the Six Nations of " New York, of the 15th of January, 1838, \$1,000," (7 Stat. 561) " For payment to Wm. Day and the chiefs of the " Orchard party of the Oneidas, stipulated in the 13th " Article of the treaty with the Six Nations of New York, " 15th January, 1838, \$2,000," (9 Stat. 33, 34. Rec., p. 21, finding 18.) This was six years after the proclamation of the treaty. Once more, and six years after the ratification of the treaty of 1838, the Executive and Legislative branches of the Government, confirm the validity of said treaty. No forfeiture or abandonment of its obligations were recognized.

Again :

June 27, 1846.

By the terms of the treaty of 1842, Article 3, provided that certain moneys were to be paid to the President in trust for the Senecas, and the sum of \$75,000 was to be paid over to him. Thereafter, by Section 2, of the Act of 1846, Chap. 34, an appropriation was made in the following words: " Section 2. And be it further enacted, " that " the sum of seventy-five thousand dollars, heretofore " paid to the President of the United States, under the treaty " made with the Seneca Indians of New York, in the year " eighteen hundred and forty-two, for the benefit of said " Indians, and the stock in which the same may have been " invested, shall be, and the same is hereby taken absolutely " to the use of the United States, in accordance with the

“ prayer of said Indians; and it shall be the duty of the
 “ Secretary of the Treasury to cancel the said stock, and
 “ place upon the books of his department the amount of
 “ seventy-five thousand dollars to the credit of said Indians,
 “ upon which sum interest shall thereafter be paid to them,
 “ at the rate of five per centum per annum; Provided, that
 “ any interest which may be due and unpaid on said stock,
 “ at the time of its cancellation, shall be forthwith paid to
 “ them.”

This act is a distinct recognition by Congress of the existence and vality of the treaty of 1842, which amended the treaty of 1838 in essential particulars, and it must be taken as a recognition of the validity and existence of the treaty of 1838 at the time of this enactment.

13.

July 29, 1848.

The United States, recognizing the validity of the treaty under consideration, for the purpose of carrying out other provisions of the same, on the 29th of July, 1848, and over eight years after the proclamation of the treaty, passed an act, which was approved by the President, in the following words and figures, to wit :

An act “to pay the Tuscaroras for proportionate share of
 “ the fund for three thousand dollars due to the Tuscaroras,
 “ as provided in the 14th Article of the treaty with the Six
 “ Nations of New York Indians of January 15th, 1838, \$88;
 “ for payment to James Cusick, Tuscarora Chief, as stipu-
 “ lated in Schedule B, appended to the treaty with the Six
 “ Nations of New York of 15th of January, 1838, \$120.” (9
 Stat. 161, ch. cxxiii. 7 Stat. 554, Art 14, p. 556. Record,
 p. 21, finding 18.) There is no forfeiture, recision or abandon-
 ment of the treaty recognized or claimed at this period,
 eight years and four months after the proclamation of the
 treaty of 1838.

14.

May 30, 1854.

A law was passed by Congress, and approved by the President, for the temporary government for the territory of Kansas, reserving therein the rights of the Indians in their "New York Kansas Reserve" in the following words, viz: (Sec. 10, Stat. 283, 284. Sec. 19.)

" Provided, however, that nothing in this Act contained
 " shall be construed to impair the rights of persons or prop-
 " erty now pertaining to the Indians of said territory, so
 " long as said rights shall remain unextinguished by treaty
 " between the United States and said Indians, as to include
 " any territory which by treaty with any Indian Tribe is
 " not without the consent of such tribe to be included with-
 " in the territorial lands or jurisdiction of any state or
 " territory."

The New York Indians' Reserve of 1,824,000 acres lays in the south-eastern part of the now State of Kansas.

15.

March 3, 1857.

Congress, in recognition of the validity of the treaty of Buffalo Creek, and for the purpose of carrying out the provisions of the said treaty, passed a law, which was approved by the President, in the following words and figures, to wit: (See 11th Stat. 184; Chap. 90, Record, p. 21, finding 15.)

" An act for the payment of this amount to William
 " King, in accordance with schedule C, (7 Stat. 557)
 " attached to the treaty with the Six Nations of New York,
 " proclaimed April 4, 1840, in accordance with the resolu-
 " tion of the Senate, March 25th, 1840, \$1,500."

It will be observed, that this unequivocal recognition,

and formal avowal of the efficacy of the treaty, by the Legislative and Executive branches of the Government, *made seventeen years* after the ratification of the treaty of January 15, 1838, and more than nineteen years after the date of the treaty, is uncontestable proof that the treaty was then operative and binding on the parties thereto, that there had been no *abandonment, forfeiture, rescision or release*, but was still *valid*—the Supreme Law of the Land.

At that very time this treaty was before this Court, in the case of *Fellows vs. Blacksmith*, (19 How. 366); and two days thereafter, to wit :

16.

March 5, 1857.

This Court handed down its decision, declaring that this treaty was valid, and binding on the United States, and *to be* the Supreme Law of the Land, and that the courts cannot go behind it for the purpose of annulling its effect and operation—that it was obligatory upon the United States, to carry it into execution. (See 19 How. 366. 21 How. 371.)

Up to this period, and seventeen years after the proclamation of the treaty, the Executive, Legislative and Judicial Branches of the Government had recognized and acknowledged the validity of the treaty, and the obligation resting upon the Government to perform the unexecuted stipulations of the same.

17.

November 5, 1857.

After the decision of this Court, referred to above, and reported in the 19th of Howard, 366, and on the 5th day of November, 1856, a treaty was made and concluded with the Tona-wanda band of the Seneca Nation of Indians, and ratified by the Senate, June 4th, 1858, and proclaimed by the

President March 31st, 1859, which fully recognized the treaty of 1838 as then in force and effect and binding on the United States. It is recited in the preamble of the treaty as follows :

“ And, whereas, in and by the said treaty there was surrendered and relinquished to the United States 500,000 acres of land in the territory of Wisconsin ; and whereas, the United States in and by said treaty agreed to set apart for said Indians certain lands in the Indian Territory immediately west of Missouri, and to grant the same to them to be held and enjoyed in fee simple, the quantity of the said land being computed to contain 320 acres to each soul of said Indians, but it agreed that any individual or any number of said Indians might remove to said territory and thereupon be entitled to hold and enjoy said lands and all the benefits of such treaty according to numbers respectively.”

“ And whereas, the United States did further agree to pay the sum of \$400,000.00 for the removal of the Indians to the said territory and for their support and assistance during the first year of their residence in the said territory.” In Article 1, of the enacting clauses, is the release, as follows :

“ Hereby surrender and relinquish to the United States all claims, separately and as a band of Indians, as part of the Seneca Nation, all the lands west of the State of Missouri and all right and claim to remove thither and for support and assistance after such removal, all other claims against the United States under the aforesaid treaty of 1838 and 1842, subject, however, to such moneys as they may be entitled to under such treaty as may be payable to the said Ogden and Fellows.”

In Article 2, “ In consideration of the aforesaid sur-

“ render and relinquishment, the United States agree to
 “ pay and invest, in the manner heretofore specified, the
 “ sum of \$256,000. for the said Tonawanda Band of
 “ Indians.”

In Article Six, it is provided, “ That the portion of the
 “ said sum of \$256,000, not expended in the purchase of
 “ lands as aforesaid, shall be invested by the Secretary of
 “ the Interior in stock in the United States in some other
 “ State and the interest thereon be paid to the Indians.”

This provision of the treaty secured to the Tonawanda band of Indians their proportionate share of 1,824,000 acres of land set apart as a reservation for the New York Indians and all their part of the \$400,000, payable under Article 15 of the treaty. (Record, page 20, finding 16.)

Do not these provisions make it clear beyond controversy that the treaty of 1838 had not been abandoned, rescinded, or forfeited, but remained valid and in full force?

The “ New York Indian Reserve” in Kansas, had been occupied by squatters. “ The whites had obtained possession, and the Government could not drive them off and “ keep them off.” (See Ex. Doc. Y., p 10. 40 Cong. 3 Sess. filed in Court of Claims January 9 1894.) The Government had determined to seize these lands, sell them to the squatters, and pay indemnity to the New York Indians at the rate of \$1.25 per acre. (See Cong. Globe of 1858-9 p 791, and 1634, etc.) This change of policy led to this treaty of 1857 as the first step towards the payment of indemnity. The Court below said :

“ The Tonawandas had a right, even in 1857, under
 “ the treaties of 1838 and 1842, to call upon the United
 “ States to aid their removal to Kansas lands, and to perform its other obligations as to their settlement there, or
 “ else to Compromise for a reasonable sum. The latter

" course was adopted, and full satisfaction made for the error
 " of judgement on the part of the United States. (Rec 39.)

Clearly, there was no difference between the Tonawanda band of Senecas and any other band, tribe or nation of the New York Indians, or their claims to indemnity under the treaty. The attempt to show a difference, is visionary. The four bands of Senecas stood on an equal footing with respect to the treaties of 1838 and 1842. And the members of the Six Nations, stood on an equal footing with each other. The Tonawandas had never demanded removal; the others had.

The policy of indemnity was inaugurated by the treaty of Nov. 5, 1857. The Court below further says :

" Wherefore, when this action was begun" (in 1859)
 " and for years before, the United States were unable by
 " *reason of their own acts*, to carry out the agreement of
 " 1838." (See Rec. 35, 21, finding 17. Cong. Globe, Part
 2, 2d Sess. 35 Cong. p 1634 and 5.)

Following this change of policy of removal, to the payment of indemnity and on

18.

May 24, 1858

The following : "S. Bill 389" was passed in the Senate in the absence of the New York Senators. (See Cong. Globe 1858 and 9, p. 1634 and 5.) " A Bill : Providing
 " for the allotment of lands to certain New York Indians
 " and for other purposes :

" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that the President be, and he is hereby directed, as
 " soon as practicable, to cause three hundred and twenty
 " acres, or one-half section of land, to be set apart and

" allotted to each individual Indian, entitled to lands in
 " the tract set apart for the use of the New York Indians,
 " and now residing thereon, by the treaty of Jan. 15th,
 " 1838, made and concluded at Buffalo Creek, in the State
 " of New York, and the treaty made at the same place on
 " the 20th day of May, 1842, said land to be selected
 " within said Reserve in Kansas Territory, in conformity to
 " the legal sub-division of the public surveys, and so as to
 " include improvements, (if any there be) of each Indian,
 " and patents for the same shall be issued to the heads of
 " each family,

" When the selections shall have been thus made and
 " allotted, the remainder of said reserve shall be considered
 " a part of the public lands, and shall be subject to settle-
 " ment, pre-emption, and entry, as other lands belonging
 " to the United States."

19.

February 3, 1859.

This bill came up in the House of Representatives, and was passed as amended, in the following form :

" Be it enacted by the Senate and House of Representa-
 " tives of the United States of America, in Congress assem-
 " bled, That the President be and he is hereby directed, as
 " soon as practicable, to cause three hundred and twenty
 " acres, or one-half section of land, to be set apart and
 " allotted to each individual Indian entitled to lands in the
 " tract set apart for the use of the New York Indians who
 " removed under the provisions of the treaties hereinafter
 " referred to, and to their children, in the tract of land set
 " apart for the use of the New York Indians by treaty of
 " January 15th, 1838, made and concluded at Buffalo
 " Creek, in the State of New York, and a treaty made at
 " the same place on the 20th day of May, 1842, said lands

" to be selected within said reserve in Kansas Territory, in
 " conformity to the legal subdivisions of the public surveys,
 " and so as to include the improvements (if any there be)
 " of each Indian, and patents for the same shall be issued
 " to each individual Indian adult or to heads of families for
 " themselves and their minor children, they to locate their
 " lands within the space of one year from the passage of this
 " act; and when the location shall have been thus made and
 " allotted, and after the expiration of said year the remain-
 " der of the reserve shall be considered a part of the public
 " lands, and shall be subject to settlement, pre-emption and
 " entry, as other lands belonging to the United States, but
 " no settlements, other than by the Indians above referred
 " to, shall be made on said reserve for the space of one
 " year, from and after the passage of this act. All settle-
 " ments heretofore made on said reserve shall be recognized
 " from the date of such settlement, and be entitled to pre-
 " emption, the same as if the said lands had been Government
 " lands, and subject to settlement: Provided that the
 " Indians named shall have precedence over any other
 " settler where the same may come in conflict.

" Sec. 2. After paying all the monies necessary for car-
 " rying out the provisions of this act, the remainder of all
 " monies accruing from the sales by pre-emption, private
 " entry, or otherwise, of any land within the tract or reserve
 " above named, *shall be paid into the Treasury of the United*
 " *States and kept as a separate and distinct fund; and held*
 " *subject to any future action of Congress in relation to said*
 " *New York Indians, or to the provision of any treaty made,*
 " *or hereafter to be made, with said Indians, or any of them, in*
 " *reference thereto.*"

Sec. 3 has reference to the jurisdiction of the District
 Courts of the United States for the Territories of Kansas

and Nebraska. (Cong. Globe, Part 1, 1st Sess. 35 Cong. p. 791.)

This bill as amended, and on

March 3, 1859,

Came up for concurrence in the Senate and its passage moved, when Senator King of New York moved the following amendment to said bill, viz: (Cong. Globe, Part 2, 2d Session, 35 Cong., p. 1634.) "By striking out all after the word 'who' in the first line of the House amendment and inserting:

"Is of or among the Indians and tribes provided for by the treaty of January 15th, 1838, made and concluded at Buffalo Creek, in the State of New York, and the treaty made at the same place, May 20, 1842, and as soon as the \$400,000 which it is provided by the 15th Article of the said treaty, shall be appropriated for aid by the United States in the removal of the said New York Indians, and for their support and benefit after removal shall be provided, the President shall appoint a Commissioner to carry out the provisions of the treaty, who shall appoint a suitable day and time within which the said New York Indians shall remove to the lands set apart for them in accordance with the provision of the said treaty, or forfeit their right to the lands, and of the day and time so appointed, immediate information shall be given to the said Indians by the President." (Ibid, p. 1634.)

Senator Seward of New York, in an able speech, defended the title and rights of the New York Indians in said lands and the subject was permitted to be dropped by common consent.

But thereafter, and on the same day, to wit:

March 3, 1859.

By the treaty of 1857, article 2, the United States agreed to pay to the Tonawanda band, \$256,000, in consideration of their surrender and relinquishment of their right under the treaty of 1838 and 1842 and to carry into effect this stipulation, Congress passed, and the President approved of the law, in the following words and figures, to wit :

“ Tonawandas—for payment and investment of this “ sum for the surrender and relinquishment of lands west “ of the State of Missouri, per 2d article of the treaty of “ November 5, 1857, \$256,000.” (11 Stat. 436, Cong. Globe, Part 2d, 2d Sess. 35 Cong., p. 1,638 ; Appendix to same, p. 359.)

February 21, 1859.

The treaty of Buffalo Creek was before this Court in the case of State of New York vs. Dibble (21 How. 371) which recognized the validity of said treaty, and declared “ That “ the treaty can be carried into execution only by the “ authority or power of the Government which was a party “ to it.”

Hereafter and on

March 3, 1859.

Congress fully, and again acknowledged the validity of the treaty of 1838, and expressly declared, in the “Sundry Civil Bill” of this date in the following words: (See 11 Stat. 430, 431.)

That in all cases where, by the terms of any Indian treaty in Kansas Territory, etc., “the Secretary of the Interior is hereby authorized,” then follows this provision:

“ That nothing herein contained shall be construed to apply
 “ to the New York Indians, or to affect their rights under
 “ the treaty made by them in 1838, at Buffalo Creek.”

In the passage of this Bill, Congress and the President not only recognized the rights of the claimants, but it protected them.

It is well settled that repeated acknowledgements of the rights and interests of others are held conclusions of law. (Bloodgood v. Bruen, 8 N. Y., 362 ; DeForest v. Warner, 98 N. Y., 221 ; 73 N. Y., 189.) Again :

23.

March 21, 1859,—

And **only** seventeen days after these repeated acknowledgements of the validity of the treaty, on March 3d 1859, as above stated, and the repeated acknowledgements by the Executive, Legislative and Judicial branches of the Government. Joseph Thompson, then Secretary of the Interior, took the matter into his own hands—Congress having adjourned—and contrary to the provisions of law, and the purpose of Congress, (as we have seen) issued his order of spoliation ; and yet recognizing the existence of the treaties and the rights of the New York Indians, as follows :

“ *It has been decided*—that the tract of land in Kansas Territory, known as the New York Indian Reserve, shall
 “ be surveyed with a view of allotting a half section each
 “ to such of the New York Indians as may have resided
 “ there under the provisions of the treaties of January 15,
 “ 1838, and May 20, 1842, after which the residue of the
 “ reserve will become a part of the public domain,” etc.

While no officer of the Government was invested with such power, the action of the Interior Department can only

be reconciled with the fact that the Government had changed its policy of removal to one of indemnity. (Rec. finding 17, p. 21.)

After the issuing of this order to the Commissioner General of the Land office, the New York Indians, in 1859,

"Employed counsel to prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims." (See finding 17, Rec. p. 21, old Rec. 139.)

It will be observed that from the time of the ratification of the treaty, April 4, 1840, to the issuing of the order of spoliation, and the employment of counsel, as aforesaid by the claimants, in 1859, there had been no treaty made, or contract executed for an abandonment, rescision, or waiver of appellants' rights, nor had there been a forfeiture claimed by the Government during that period of nineteen years.

24.

December 3 and 17, 1860.

It is true that in view of the steps taken by Secretary Thompson aforesaid, President Lincoln, (and while counsel for the New York Indians were prosecuting their claim for indemnity) issued his proclamation, offering these lands for sale. J. D. C. Atkins, Commissioner of Indian Affairs, on November 24, 1886, made the following report among other things to the Court of Claims: (See 1st Record, p. 141; also Record, p. 21, finding 17.)

"The lands secured to the New York Indians by said treaty (1838, except those allotted to thirty-two persons)

“ were offered for sale by proclamation of the President,
 “ dated December 3 and 17, 1860, and since that time, at
 “ least, have been included in the territory or State of
 “ Kansas.”

In these proceedings, up to this date, the Government had not claimed an abandonment, rescision, forfeiture or waiver, but the Government proceeded—all the time recognizing the validity of the treaty and the rights of the claimants—upon the ground that indemnity was due appellants ; and *that* is seen by the subsequent action of President Lincoln, in the appointment of a Commissioner, to negotiate with the New York Indians, by treaty, for a settlement of their claims ; and in the subsequent acts of the Executive, Legislative and Judicial branches of the Government.

25.

January 29, 1861.

Congress passed an act admitting Kansas into the Union as a State, which act contained this provision : (See 12 Stat. 126.)

“ *Provided*, That nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory which by treaty with such Indian tribes, is not without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory ; that all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until said tribes shall signify their assent to the President of the United States to be included within said State.”

Why was said provision made? Because Article 4 of the treaty of 1838 provided as follows:

"The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union."

That "*Proviso*" was for the benefit of the New York Indians, and a distinct recognition by Congress and by the President, of the then existing rights of said Indians in the "New York Indian Reserve." This was 21 years after the ratification of the treaty, and at a time Counsel was prosecuting their claim for indemnity. The "*Proviso*" furnishes proof also, that the rights of the New York Indians in said Reserve, had not been "extinguished by treaty," nor by forfeiture, abandonment, rescision or waiver, nor the Government released from the unexecuted stipulations of said treaty. This is also confirmed in the succeeding paragraph.

26.

September 2, 1863,

The President—who issued his proclamation December 2 and 17, for the sale of said lands—recognizing this claim for indemnity, appointed a Commissioner, Dole, to proceed to Kansas, to negotiate a treaty with such of the New York Indians who had gone there under the treaty of 1838, to extinguish their title in the Kansas lands, and to pay them indemnity, based on the treaty of November 5, 1857, with the Tonawandas. A treaty with them was made and concluded, and the President transmitted it to the Senate, where it was suspended "until a treaty could be concluded with all the New York Indians, to arrange all matters between them and the United States which required adjustment." (See Rep. Com. Indian Affairs, of 1863, p. —; Old Record, p. 124; Report of N. G. Taylor, Com. of Ind.

Affairs ; Ex. Doc. Y., p. 2 ; 40th Cong., 3 Sess.) This was a distinct recognition of the existence and force of the treaty by the President and Interior Department, and of the rights of appellants to indemnity. Again,

27.

April 26, 1864.

The Secretary of the Interior, Usher, addressed an official communication to Judge George Barker, of Fredonia, N. Y., in which he stated :

" I thought it proper to advise you, as the agent of the
 " New York Indians, that it is the *desire* of the Govern-
 " ment to *extinguish their title* to a tract of land in Kansas,
 " ceded to them by the treaty of January 15, 1838 ; that a
 " treaty has already been made for that purpose with the
 " fragments of bands of those Indians residing in Kansas,
 " and that a similar one will be made with those in New
 " York abating the commutation, or transportation thither,
 " if it be the pleasure of the Indians in New York
 " to agree to those terms, and that the Department
 " will detail Mr. Mix, or other competent person to
 " meet the New York Indians in council to agree upon
 " terms of the proposed treaty, upon proper notice
 " being given of their meeting at any time within
 " three weeks from this date." (See 1st Rec. Court of
 Claims, p. 137.)

In pursuance thereof, and on the 5th day of May, 1864, President Lincoln—pursuing the new policy of taking their lands, and paying indemnity, appointed Hon. Charles E. Mix, a Commissioner, with instructions,

" To proceed to the State of New York for the purpose
 " of negotiating a treaty with the New York Indians,
 " whom you are requested to meet on the 9th inst. at the
 " Cattaraugus Reservation, as indicated in the letter of

“ George Barker, Esq., of the 26th ultimo. Herewith you
 “ will receive the form of the treaty it is proposed to make
 “ with the Indians referred to, and you will endeavor to
 “ impress upon their minds the necessity which exists for
 “ their consenting to its terms,” etc.

The treaty was not concluded, owing to the disturbance of a few disaffected Indians. (See 1st Record Court of Claims, 120. Ex. Doc., No. 1, 28 Cong. 2 Sess., p. 188.)

28.

December 6, 1864.

(Ex. Doc. No. 1, 28 Cong. 2 Sess., p. 188.) The Secretary of the Interior, J. P. Usher, in his annual report to the President and to Congress with reference to the treaty of Buffalo Creek, the aforesaid appointment of Commissioner Mix, to settle by treaty the claims of the appellants, said :

“ Directions having been given for the surveying and
 “ sale of the lands in Kansas *belonging* to the New York
 “ Indians, without *first* providing for the *extinguishment* of
 “ *their title*, the Indians were *of course*, dissatisfied, made
 “ urgent appeals for compensation or indemnity for this
 “ *spoliation*. *Their claims being undeniable and just*, I ap-
 “ pointed a Commissioner,” etc.

This, from the officer at the head of the Interior Department, having in custody the records, is undeniable evidence of the existence and validity of the treaty, the justice of the appellant's claim, and that there had been a wrongful seizure of the lands without just compensation. This was 23 years after the ratification of the treaty—showing there had been no abandonment, settlement, rescision or waiver on the part of the appellants.

29.

December 5, 1866.

The Commissioner of Indian Affairs—Cooley—in his

annual report of this date at p. 61, says, among other things : " In my opinion the New York Indians have a just and valid claim arising out of the treaty of Buffalo Creek. I trust that Congress will, by legislation, provide for an equitable settlement of this claim."

30.

November 30, 1868.

The President, recognizing the obligations of the United States, and their duty to pay the New York Indians a just indemnity, and to secure a release of their title to the Kansas lands, on this day appointed Hon. Walter R. Irving, a commissioner to proceed to New York and negotiate a settlement with said Indians. His instructions were in part as follows : (See 1st Recl. Court of Claims, p. 123. Ex. Doc. Y., p. 10, 40 Cong., 3 Sess.)

" To negotiate a treaty or treaties with the Senecas and other New York Indians.

" It is presumed that these Indians desire to remain in the State of New York. If you find such to be the case, you will endeavor to negotiate a treaty or treaties by which their claims arising under the treaties of 1838 and 1842 may be satisfied.

" To provide for this, stipulations can be made for the issue and disposition of certificates for land made locatable upon any of the unoccupied public lands of the United States, in satisfaction of the claims of the Indians under the treaties of 1838 and 1842, or by appropriation by Congress for the same purpose, or in the alternative, as you may think proper," etc.

" In pursuance of these instructions," etc.

31.

December 4, 1868,

A treaty was made and concluded between the United

States and the New York Indians of the Six Nations, in and by which the United States agreed to pay to the New York Indians, including the Wisconsin Indians, \$320 for each soul, including half-breeds, which would have made a sum of over \$2,500,000.

This treaty with all the proceedings are set forth in Ex. Doc. Y., p. 1 to 10, 40 Cong., 3 Sess. A copy filed in the Court of Claims, January 8, 1894.

This treaty failed of ratification before March 3d, 1871, when Congress enacted what is now Section 2079 of the Revised Statutes, which is as follows, to wit :

“ Section 2079. No Indian nation or tribe within the “ territory of the United States shall be acknowledged or “ recognized as an independent nation, tribe or power with “ whom the United States may contract by treaty ; but no “ obligation of any treaty lawfully made and ratified with any “ such Indian nation or tribe prior to March 3d, eighteen hun- “ dred and seventy-one, shall be hereby invalidated or im- “ paired.” (Act March 3, 1871, C. 120, S. 1, Vol. 16, p. 566.)

The Political Department of the Government having recognized that the treaty of 1838 was in force in December, 1868, and that a just indemnity was due the claimants, the Court cannot go behind that decision. (Taylor v. Morton, 2d Curt., 454 ; Fellows v. Blacksmith, 19 How. 366.)

32.

It will be seen by Ex. Doc. Y. (40 Cong., 3d Sess.) p. 10, the reason why the Government did not move the Indians to their new homes. The Commissioner informed the Council Dec. 4, 1868, to wit : “ The reason why the New “ York Indians had not been removed to their Kansas “ Reservation was because squatters had obtained possession

" of their lands, and the United States was unable to drive them off and keep them off."

33.

December 10, 1883.

Between 1871 and 1883 various bills were introduced into both Houses of Congress for appropriations to be made for a settlement of appellant's claim. Only one need be mentioned : the S. Bill, 467, introduced by Senator Lapham of New York.

" To provide for a settlement with the Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York on the 15th day of January, 1838, for the unexecuted stipulation of that treaty."

This bill is found at p. 106 of 1st Recd. Court of Claims. This bill, by order of the Senate, June 21, 1884, with all documents appertaining thereto were sent to the Court of Claims, (Old Record 107.) A like bill, No. 7559, was introduced in the House of Representatives, March 2, 1883, by the Committee of Indian Affairs ; and by order of the House was sent to the Court of Claims, June 30, 1884. (Old Rec. pp. 169 and 108.)

These references were made under " the Bowman act," so-called, referring the claims of appellants to the Court of Claims for the investigation and determination by that Court of the facts involved in this claim.

34.

January 29, 1884.

Hon. H. Price, Commissioner of Indian Affairs, to the Secretary of the Interior, for the information of the Senate Committee on Indian Affairs, among other thing, said : (See Report, Old Record, p. 109, etc.) " The quantity of land assigned the New York Indians, west of the State

“ of Missouri, by the 2d Article of the treaty of 1838 was
 “ 1,824,000 acres ; the amount of money agreed to be ap-
 “ propriated by the 15th Article of the treaty was \$400,000 ;
 “ of which the sum of \$13,272.85 was expended for the
 “ removal of some 260 Indians.

“ The amount paid the Tonawandas, under the treaty
 “ of Nov. 5, 1857, was \$265,000.

“ The sum to be invested for these Indians under the 2d
 “ Section of the bill is, therefore, \$1,968,000—computing
 “ the interest at five per centum up to the 5th of last
 “ November, 26 years—the total amount required is four
 “ millions five hundred and twenty-six thousand and four
 “ hundred dollars. * * * * *

“ Should the bill be amended by allowing credits above
 “ suggested, and striking out the provision for interest, the
 “ amount required to carry it into effect would be \$1,944,-
 “ 487.15. * * * * *

Referring to the 200 Indians removed under Agent
 Hogeboom in the spring of 1846, he says :

“ These parties were removed under the direction of an
 “ agent of the Government and from the hostility of the
 “ white settlers, and the *failure of the Government to provide*
 “ *them homes*, were forced to return east. * * *

“ With the amendments suggested the bill *meets my*
 “ *approval*. * * * * *

“ By the treaty of 1838 the six tribes of New York
 “ Indians relinquished to the Government 500,000 acres of
 “ valuable land in the State of Wisconsin, for which, owing
 “ to the failure of said treaty, *they have received no considera-*
 “ *tion.*”

“ It was the policy of the Government, *at that time*, to
 “ secure the removal of all Indians to the country west of
 “ the Mississippi,” etc.

“ The President never appointed a time for their removal,
 “ as provided in the treaty, and Congress never made the
 “ appropriation stipulated ; therefore *their failure to remove*
 “ *did not work a forfeiture* prescribed in Article 3, as would
 “ have been the case had the time within which the
 “ removal must take place been fixed by the President, and
 “ the appropriation made.

“ The validity of the claims of these Indians was recog-
 “ nized in the case of the Tonawanda band of Senecas
 “ under the treaty of November 5, 1857, (11 Stat. 735)
 “ before referred to, and *I see no reason why* the other tribes
 “ should not receive the same relief.”

In a report, made for the House Indian Committee, February 9, 1883, H. Price, Commissioner of Indian Affairs, among other things, said : (See Record below, p. 172.)

“ Permission was given by this office for the removal of
 “ a number not less than 250, after the five years had ex-
 “ pired. No time was ever named by the President in
 “ which the removal must be made or their rights to the
 “ land forfeited ; nor was any part of the \$400,000 appro-
 “ priated, except the \$20,477.50 before mentioned. It would
 “ seem, therefore, that the United States has not performed
 “ all the conditions precedent required by the treaty.

“ In view of all the facts in the case I am inclined to
 “ the opinion that the petition of these Indians is entitled
 “ to some consideration.

“ Should they now insist upon their right to remove and
 “ occupy the lands under the treaty, I do not think that
 “ the government could show such a refusal on the part of
 “ the Indians, and such a performance of conditions on its
 “ part as would release it from the obligations of the treaty.

“ It is presumed that all the lands ceded to these Indians

" by the treaty of 1838, except that patented to the thirty-
 " two Indians hereinbefore referred to, has been disposed of
 " under the general laws providing for the disposition of
 " the public domain, and the proceeds thereof covered into
 " the Treasury of the United States. The government,
 " therefore, is not now in condition to fulfill the stipula-
 " tions of the treaty regarding removal, if required to do
 " so, and the Indians would seem to be entitled to some
 " compension in lieu thereof.

" The relief prayed for does not appear to be excessive,
 " and is not for the benefit of the Indians individually, but
 " for their advantage and improvement as a race.

" I think that a due consideration for them as wards of a
 " powerful nation, and a liberal construction of their rights
 " under treaty stipulations, require that the relief asked for
 " should be granted."

These acknowledgments of the appellant's just claim to
 indemnity were forty-four years after the proclamation of
 the treaty of 1838.

35.

January 16, 1892.

The Court of Claims transmitted its findings, filed by the
 Court in the case to the Committee on Indian Affairs,
 United States Senate, by which the Court found a balance
 due the appellants of \$1,971,295.92, a copy of which is
 printed in "Additional Brief" for appellants, commencing
 at p. 39 ; also Congressional Record, 52 Cong., 2d Sess.,
 pp. 248 to 253.

Thereafter a bill was introduced in both houses of Con-
 gress which in terms provided relief for the claimants on

the basis of the finding of the Court of Claims, and the House Committee reported "That the amount due the Indians under the treaty as ascertained by the Committee and Court of Claims is \$1,971,295.92, after making all allowances for credit in behalf of the United States. And also in view of all the facts the committee recommend the passage of the bill with the usual allowance of interest in cases of the Indian claim and judgment of the Court of Claims namely, 5 per cent. from the 5th day of November, 1857." (See Senate report No. 1858 of the 56 Congress, 1st Sess., made on the 13th of July, 1892.) The Senate on considering the same bill recommended and passed the enabling act under which this Court now has jurisdiction, and after the passage of the bill by the Senate the House substituted it for its own bill and passed the same.

These manifold acts of the Executive, Legislative and Judicial Departments of the Government, extending in an unbroken line, from March 2, 1839, to January 16, 1892,—a period of about 53 years—the passage of law after law ; the doing of act after act ; and recognition after recognition ; and acknowledgment after acknowledgment ;—and in view of the admitted fact, that the Government sold all the claimant's lands,—the 500,000 acres at Green Bay, and the 1,824,000 acres in Kansas, and received the pay therefor at the rate of \$1.34 an acre, (Finding 15, Recd. p. 20) and covered the same into the Treasury of the United States, and had the use of the same for more than 30 years, while the claimants have not had one penny,—forces the unchangeable conclusion that the treaty of Buffalo Creek was, and still is the supreme law of the land, and that the appellant's claim to indemnity is uncontrovertible.

It is a rule of general application that a party to a con-

tract who is in the position to set up a forfeiture, releasing him from his own stipulations set forth in the contract, he must assert his right the first opportunity and if he thereafter deals with the other party as if the contract remained in force, it constitutes a waiver. Another general rule may be stated in this connection as applicable to this case, to wit : If the loss incurred by the forfeiture is great and its enforcement seems harsh, in such instances, the Courts are inclined to seize on a slight recognition of the contract, to defeat the result of forfeiture. If this ground of defense prevails, the claimant's loss will be great and harsh, and it may be added, cruel and unjust.

When a party who urges a forfeiture as a defense for the non-performance of his own stipulations, stands in a fiduciary relation towards the other party at the time of making the agreement, the Court will be vigilant in searching the whole case for some fact, event or circumstance upon which a waiver may be properly and justly founded.

The relation of guardian and ward exists between the United States and these Indians, as this Court has repeatedly declared.

In the first treaty negotiated between the United States and these nations (1784) the United States "named them as friends and promised them protection."

In every treaty since that time this sentiment has been repeated in some form of expression. In the treaty under consideration the President declared he was "anxious to promote the *prosperity and happiness* of his red children." In the next paragraph the Indians released their title to their Wisconsin lands, and the United States promised "to

protect and defend them in the peaceable possession and enjoyment of their new homes."

Respectfully submitted,

HENRY E. DAVIS,
GUION MILLER,
For the Appellants.

JOSEPH H. CHOATE,
GEORGE BARKER,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
Of Counsel.

17. 3. 4. 7. 10. 13. 16. 19. 22. 25. 28. 31. 34. 37. 40. 43. 46. 49. 52. 55. 58. 61. 64. 67. 70. 73. 76. 79. 82. 85. 88. 91. 94. 97. 100. 103. 106. 109. 112. 115. 118. 121. 124. 127. 130. 133. 136. 139. 142. 145. 148. 151. 154. 157. 160. 163. 166. 169. 172. 175. 178. 181. 184. 187. 190. 193. 196. 199. 202. 205. 208. 211. 214. 217. 220. 223. 226. 229. 232. 235. 238. 241. 244. 247. 250. 253. 256. 259. 262. 265. 268. 271. 274. 277. 280. 283. 286. 289. 292. 295. 298. 301. 304. 307. 310. 313. 316. 319. 322. 325. 328. 331. 334. 337. 340. 343. 346. 349. 352. 355. 358. 361. 364. 367. 370. 373. 376. 379. 382. 385. 388. 391. 394. 397. 400. 403. 406. 409. 412. 415. 418. 421. 424. 427. 430. 433. 436. 439. 442. 445. 448. 451. 454. 457. 460. 463. 466. 469. 472. 475. 478. 481. 484. 487. 490. 493. 496. 499. 502. 505. 508. 511. 514. 517. 520. 523. 526. 529. 532. 535. 538. 541. 544. 547. 550. 553. 556. 559. 562. 565. 568. 571. 574. 577. 580. 583. 586. 589. 592. 595. 598. 601. 604. 607. 610. 613. 616. 619. 622. 625. 628. 631. 634. 637. 640. 643. 646. 649. 652. 655. 658. 661. 664. 667. 670. 673. 676. 679. 682. 685. 688. 691. 694. 697. 700. 703. 706. 709. 712. 715. 718. 721. 724. 727. 730. 733. 736. 739. 742. 745. 748. 751. 754. 757. 760. 763. 766. 769. 772. 775. 778. 781. 784. 787. 790. 793. 796. 799. 802. 805. 808. 811. 814. 817. 820. 823. 826. 829. 832. 835. 838. 841. 844. 847. 850. 853. 856. 859. 862. 865. 868. 871. 874. 877. 880. 883. 886. 889. 892. 895. 898. 901. 904. 907. 910. 913. 916. 919. 922. 925. 928. 931. 934. 937. 940. 943. 946. 949. 952. 955. 958. 961. 964. 967. 970. 973. 976. 979. 982. 985. 988. 991. 994. 997. 1000.

Motion Papers for Apprs.

JAN 27 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

Filed Jan. 27, 1896.

No. 864.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

MOTION TO ADVANCE.

Come now the appellants by their attorneys and move the Court to advance the above-entitled cause for hearing at as early a day of the now current term as to the Court may be found convenient, upon the following grounds:

1. The claim upon which the appellants' case is based arose nearly half a century ago, and its adjudication has been delayed without any fault on their part and wholly by the inaction of Government.

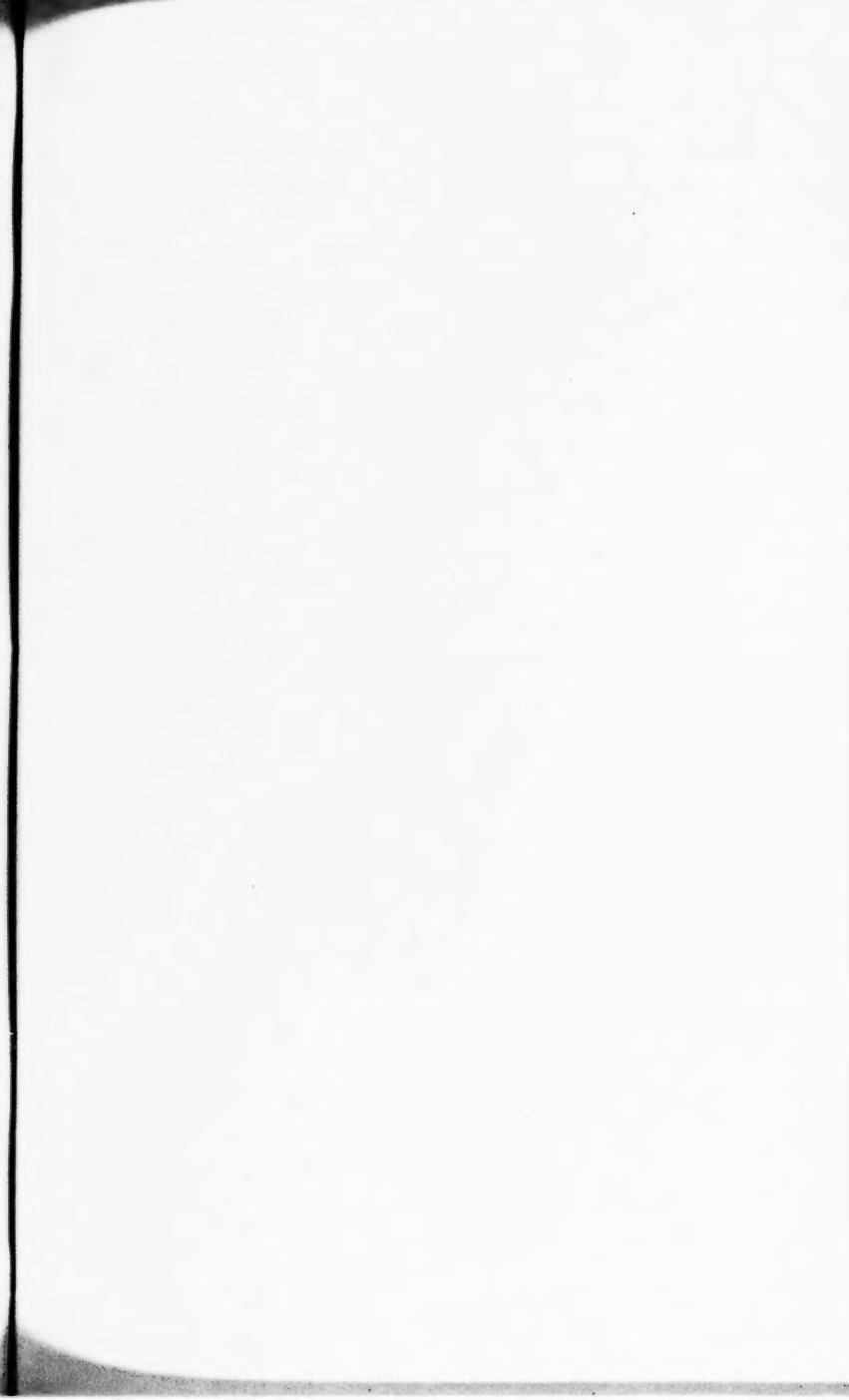
2. As the record shows, the case of the appellants has been twice acted upon by the Congress of the United States and

Court of Claims, the first time by reference and consideration under the Bowman act, so called, and the second time by reference and consideration under special act approved January 28, 1893 (27 Stats., 426). The time consumed by these hearings has been of great disadvantage to the appellants and any further delay will be of more serious disadvantage to them.

3. The act authorizing the Court of Claims to hear and determine the claims of the appellants, to wit, the act of January 28, 1893, aforesaid, confers jurisdiction of the cause upon that court, and also upon this Court upon appeal, and it is in terms provided in and by said act as follows: "Said cause shall be advanced on the docket and tried without delay in any court which shall become invested with jurisdiction thereof by the provisions of this act."

Respectfully submitted.

HENRY E. DAVIS,
GUYON MILLER,
Attorneys for Appellants.





N^o. 106.

APR 28 1898
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

Motion to Amend &c.

OCTOBER TERM, 1897.

Filed April 28, 1898.

THE NEW YORK INDIANS, }
 vs. } Appeal from the Court of Claims.
THE UNITED STATES. }

Motion to Amend the Instructions to be Issued to the Court of Claims.

Now come the Appellants by their attorney and move the Court for an order amending the instructions to be issued to the Court of Claims in the above entitled cause, as indicated in the last paragraph of the opinion of the Court, rendered on the 11th day of April, 1898, so that said instructions may be made to read in effect, as follows:

The judgment of the Court of Claims is, therefore, reversed, and the case is remanded with instructions to enter judgment for the Claimants for an amount to be represented by the 1,824,000 acres of land mentioned in the treaty, less the amount of land upon the basis of which settlement was made with the Tonawandas, and less the 10,240 acres allotted the 32 New York Indians, as set forth in finding XII, at the rate of the net price per acre realized by the United States for such of said lands as were sold, without interest, and for such other proceedings as may be necessary and in conformity with this opinion.

GUION MILLER,

Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

NO. 106.

THE NEW YORK INDIANS,

vs

THE UNITED STATES.

} Appeal from the Court of Claims.

Brief in Support of Motion.

This motion is made because of the fear of the Counsel for the Appellants, that if the language used in the last paragraph of the opinion of the Court should be transcribed as a portion of the Mandate, to be issued to the Court of Claims, it might be misconstrued by the Court of Claims to the detriment of the Appellants and contrary to the real purpose of this Court.

This liability to misconstruction arises from the indefinite language found in the second paragraph of finding XV (Record, page 20), in regard to the disposition made by the United States of the Kansas lands. The language referred to is as follows:

"The lands west of the Mississippi, secured to the claimants by the treaty of Buffalo Creek, have been since that treaty surveyed and made a part of the public domain, and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of said lands, as were sold, was at the rate of \$1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about \$1.22 per acre."

This finding does not disclose the fact that a considerable portion of these lands was disposed of by the United States under Military Bounty Land Warrants, selections made by the State of Kansas for internal improvements and school purposes, homestead entries, etc., for which the United States received practically nothing in cash.

"The net amount actually received by the Government for the Kansas lands," if construed to mean the amount actually received in cash, would, therefore, be an amount very much less than the value of these lands as measured by the net price per acre actually received by the Government for such of the lands as were sold.

As this Court has held that the Appellants' title to these lands remained unimpaired at the time they were taken possession of by the United States and opened to settlement, it would seem to be only just that they should receive as compensation such a sum as would fairly represent the actual value of the lands at the time they were taken, without regard to the actual disposition the United States may have seen fit to make of them.

If the Government had given all of these lands away, this would not have destroyed its liability to the Indians. The Court of Claims has, however, found as above set forth, that the United States "received the consideration therefor," and for the purposes of this suit it cannot be material whether there was a monetary or other consideration.

As a measure of value, the net price per acre actually received by the Government for such of the lands as were sold, would seem to be reasonable. That this measure would not be excessive in this case is made manifest by finding of fact XX, (Record page 22), which is as follows:

"There is evidence tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States."

GUION MILLER,
GEORGE BARKER,
For the Appellants.

JOSEPH H. CHOATE,
JAMES B. JENKINS,
JONAS H. McGOWAN,
Of Counsel.

No. 106.
In the Supreme Court of the United States.

October Term, 1897.

No. 106.

THE NEW YORK INDIANS

vs.

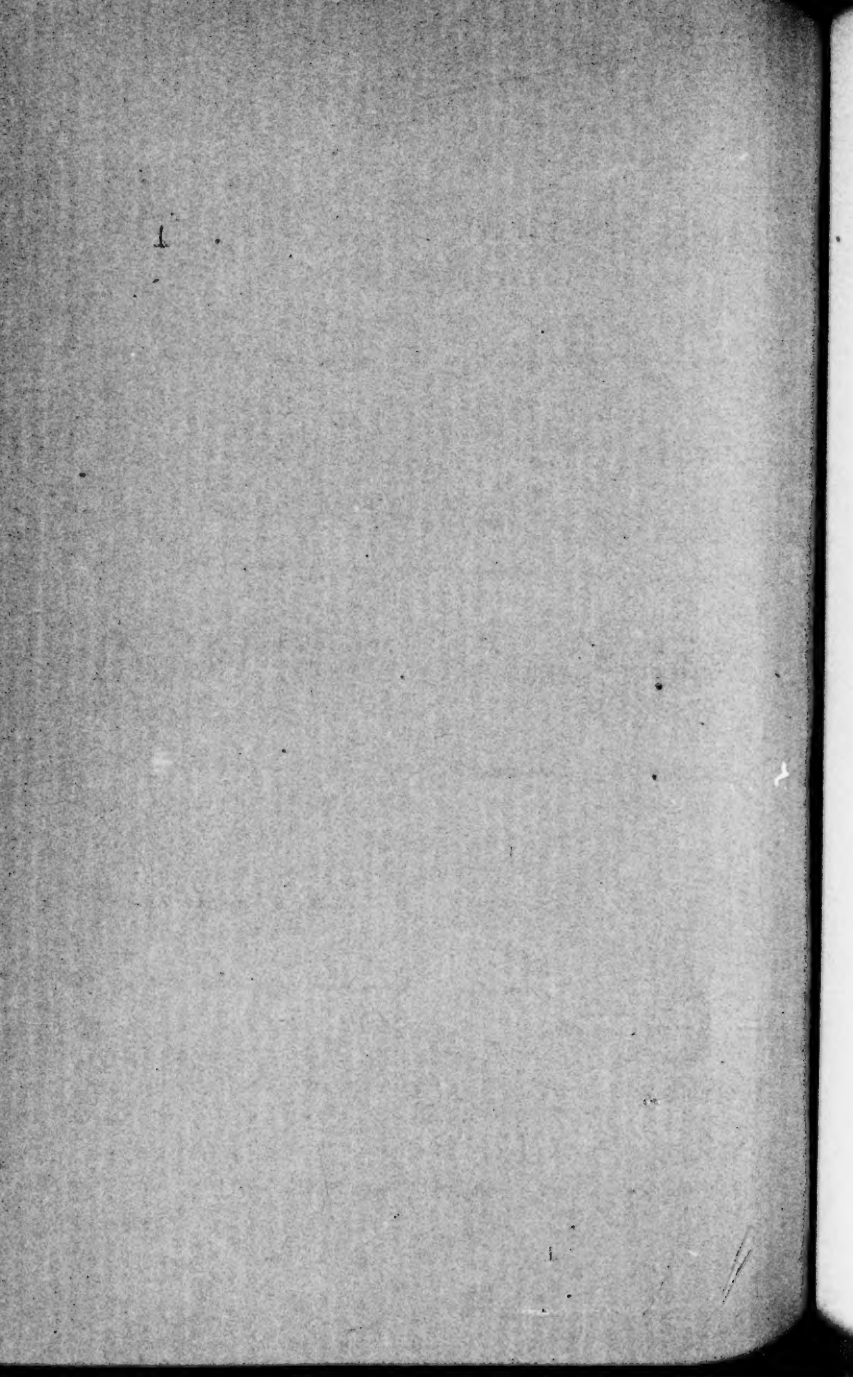
THE UNITED STATES.

} **Appeal from the Court of
Claims.**

**REPLY BRIEF FOR THE APPELLANTS ON MO-
TION TO AMEND INSTRUCTIONS TO THE COURT
OF CLAIMS.**

**GUION MILLER,
GEORGE BARKER,
*For the Appellants.***

**JOSEPH H. CHOATE,
JAMES B. JENKINS,
JONAS H. MCGOWAN,
*Of Counsel.***



In the Supreme Court of the United States.

October Term, 1897.

No. 106.

THE NEW YORK INDIANS

vs.

THE UNITED STATES.

} Appeal from the Court of
Claims.

REPLY BRIEF FOR THE APPELLANTS ON MOTION TO AMEND INSTRUCTIONS TO THE COURT OF CLAIMS.

I.

The Attorney-General in his brief admits that the instructions to the Court of Claims should be modified so as to give judgment for the value of lands disposed of by the Government for other considerations than cash. As we understand it that is the only point raised by our motion.

II.

His second point is that the motion opens for discussion before this Court the question of who are or should be beneficiaries under the judgment. This question we had supposed to be fully settled by the findings of fact and opinion of the Court of Claims and by the opinion of this Court.

The questions as to who were parties were fully considered by the Court of Claims and decided against the present contention of the Attorney-General (see Finding of Fact I, Record, p. 7, and the opinion of the Court of Claims, Record, pp. 31 and 32 and 36 and 37), and they were again argued in this Court, and the finding of the lower court either affirmed or left undisturbed.

(*Note.*—The Attorney-General states that Senate Document "Confidential B," which we referred to in the reargument, was not before the Court of Claims and intimates that that Court might have ruled differently as to parties if it had been. While "Confidential B" was not in the case below, all the facts now relied upon by the Attorney-General were in the record in the Court below, having been obtained from other sources.)

On page 12 of the opinion this Court says:

"Second. The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. *There was no uncertainty as to the lands granted, or as to the identity of the grantees*, which, in the case of *Heydenfeldt vs. Daney Mining Co.* (93 U. S., 634), was held to turn it into a grant *in futuro*."

Again, on page 17 of its opinion, in speaking of the Council of June 2, 1846, this Court says that **four** of the tribes did not wish to go West, but "There is no finding that the other *five tribes* did refuse," thus clearly indicating that all nine tribes mentioned in *Schedule A* are parties to the treaty. And again, on page 18 of its opinion, this Court says: "But the Tonawandas were but (part of) one of the *nine tribes which participated in the treaty*."

Moreover, as we read the opinion, this Court holds that by Article II of the Treaty, there was a grant *in presenti* of the lands therein mentioned, to wit, 1,824,000 acres to the

Indians, and that Article in terms states that it is intended as a future home "for all the New York Indians now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, &c.," and in the conclusion of that article it states that it is intended as a future home for "the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridge, Munsees, and Brothertowns, residing in the State of New York, and the same to be divided equally among them according to their respective numbers, as mentioned in the schedule hereunto annexed." This schedule contains a list of these same nine tribes, and on its face shows that a portion of the Indians resided in Wisconsin.

Moreover, the Government has recognized the right of all these Indians to participate by negotiating the treaty in 1868, in which the Wisconsin Indians were expressly provided for. (See Opinion, p. 20.)

In any case, however, the 1,824,000 acres were granted to such of the Indians as were included in the grant, so that the amount of the judgment to be entered would not be changed, and the only difference would be in the distribution of the proceeds.

All these questions, therefore, as to parties and beneficiaries, and as to the extent of the grant, have been already determined, but the Attorney-General treats our motion as an application for a rehearing on these points and contends—

(a) That the Onondagas at Onondaga are not beneficiaries because they did not sign the Treaty or assent to the amendments.

(b) That the Oneidas of Wisconsin are not beneficiaries because they did not assent to the amended Treaty, and because they, by their treaty of February 3, 1838 (7 Stat., 566), ceded to the United States all their rights to the 500,000 acres in Wisconsin in consideration of \$33,500.

(c) That the Stockbridges, Munsees and Brothertowns are not beneficiaries, because they did not sign the Treaty or assent to the amendments, and because they had no interest in the 500,000 acres in Wisconsin.

(d) That the grant was only of 320 acres to each of the Indians of the tribes that were parties to the Treaty.

(e) That the 176 Indians who went to Kansas and either died or returned to New York never having received a patent, lost thereby all rights to the Kansas lands.

Should the Court determine to again consider these questions we submit :

First. That, with reference to the Onondagas at Onondaga, they were enumerated as parties and beneficiaries under the treaty of 1832, whereby the 500,000 acres in Wisconsin were ceded to the New York Indians. They were also named as parties and beneficiaries of the treaty of Buffalo Creek ; and the President and Senate declared that that treaty as amended had been assented to by the several tribes of New York Indians, and the President proclaimed the treaty as ratified and confirmed in every Article and clause thereof. These Onondagas are expressly mentioned in Schedule A, annexed to and made part of the Treaty ; and they have received no compensation for the loss of their share in the Wisconsin lands. These contentions are supported by the decision of the Court of Claims on pages 31, 32 and 36, 37. See also Van Buren's message to the Senate, Executive Journal, Vol. V, page 182, in which the assent of *all* the tribes except the Senecas is asserted. Moreover, some of the Onondaga chiefs (those residing with the Senecas) did sign the Treaty and assent to the amendments, and it is for the Senate and President alone to determine whether or not this bound the whole tribe.

Second. The Attorney-General says the Oneidas of Wisconsin did not assent to the amended Treaty, citing as proof the report of the Commissioner as set out in "Confidential B." This report was made more than a year before the Treaty was proclaimed. All that has been said above as to the declarations of the President and Senate, that *all* the tribes *had* assented to the amendments, applies equally to the Oneidas of Wisconsin. It was also for the President and Senate to determine whether or not the signatures of that portion of the Oneida tribe residing in New York was sufficient for the whole tribe, especially in view of the fact that the assent to the amended Treaty was as follows: "We the undersigned chiefs of the Oneida tribe of New York Indians do give our free and voluntary assent," &c., and is signed "First Christian Party," giving eleven signatures, "Orchard Party" giving four signatures, among which is the name, "Henry Jordan," which, as will be seen, is among the Oneidas of Green Bay, who signed the original treaty. "Second Christian Party" giving five signatures, making a total of twenty signatures to the amended treaty by the Oneidas, while there were but six Oneida signatures to the original treaty, four of whom were from Wisconsin, Jordan being one of the four.

The Attorney-General further claims that the Oneidas of Wisconsin ceded by the Treaty of February 3, 1838, all their rights in the 500,000 acre tract for the sum of \$33,500. In response to this allegation we declare that the Attorney-General has wholly misapprehended the terms of the treaty of February 3, 1838. This latter treaty was made after the treaty of Buffalo Creek was made and pending before the Senate. In Article 19 of this latter treaty as originally drawn was a provision for paying the Wisconsin Oneidas \$33,500, which provision was in the following words: "As a remuneration for money laid out and expended by said

parties (Orchard and First Christian Oneidas), and for services rendered by their chiefs and agents in securing the title to the Green Bay lands and removing to the same." (Record, p. 14.)

This language is literally carried into the third Article of the Treaty of February 3, 1838. This latter treaty, upon the terms of which the Attorney-General relies to cut off the Oneidas of Wisconsin, discloses no other consideration running from the United States to the Indians than this \$33,500 which they were to get under the terms of original Article 19 of the Treaty of Buffalo Creek, as a special additional allowance, which article was stricken out by the Senate in view of the subsequent treaty of February 3, 1838.

Thus the claim of the Attorney-General that the Oneidas at Green Bay were paid \$33,500 for their interest in the 500,000 acres is shown to have no support whatever. Again, it should be noted that Articles 1 and 2 of the treaty of February 3d have relation only to the tract of land which was excepted from the 500,000 acres in the first Article of the Treaty of Buffalo Creek, and which was occupied by the Oneidas. The two articles named provided for conveying to the United States the balance of this excepted tract, after allowing the Oneidas 100 acres each. Another claim of the appellant is to the effect that the fact that the Senate struck out Article 19 of the original Treaty proves that the Oneidas at Green Bay were no longer parties to it. Yet that Article contained the following language :

" It is expressly agreed that if the Senate of the United States does not ratify and confirm the above, in relation to the Green Bay Indians, it shall not invalidate any of the other provisions of this Treaty." (Record, p. 14.)

Thus the two treaties, read together, entirely dispose of the contention of the Attorney-General on this point.

Third. As to the proposed exclusion of the Stockbridges, Munsees, and Brothertowns from sharing in the results of the judgment, because of their failure to sign the original Treaty or assent to the amendments, sufficient has been said above in discussing the rights of the other Indians who are named as beneficiaries, but who did not sign the Treaty. However, it may properly be added here, that it was not at all necessary that these Indians should sign the treaty in order to be parties thereto. They were to share the benefits. This made them parties with an interest that could be enforced. The law of contracts on this point is plain. And it may also be said that at the time the Treaty was made the Oneidas of New York claimed that these Western Indians were their wards, and they were legally capable of contracting on their behalf, and hence they signed the Treaty "for themselves and their parties." (7 Stat., 555.) This claim on the part of the New York Oneidas has corroboration in the Treaty of November 11, 1794 (7 Stats., 45), where in Article 4, the lands of the "Six Nations, or *their Indian friends residing thereon and united with them*" are mentioned.

It is quite likely that the officers of the Government who negotiated the Treaty took the same view.

But the Attorney General says that these three small tribes had no interest in the 500,000 acre tract ceded to the United States by the Treaty.

An examination of the Treaties shows this contention to be erroneous.

The Treaty of February 8, 1831 (7 Stats., 342), between the Menominees and the United States and the modification of the same of February 17, 1831, by which the Menominees ceded this 500,000 acre tract speaks only of "*the New York Indians*," or "*the several tribes of the New York Indians*," and what constituted "*the New York Indians*" is expressly

stated in the appendix to the Treaty of October 27, 1832, found in 7 Statutes, 409, where, in speaking of this grant, the New York Indians are described as "*the New York Indians, more particularly known as the Stockbridge, Munsee, and Brothertown tribes, the Six Nations, and the St. Regis tribe.*"

This Treaty of February 7 and 17, 1831, was ratified by the Senate with a proviso "*that for the purpose of establishing the rights of the New York Indians on a permanent and just footing,*" two townships of land shall be laid off for the use of Stockbridge and Munsee tribes, and one township for the use of the Brothertown tribe in lieu of the reservations then occupied by those tribes which they were obliged to surrender, and the improvements on which were to be paid for. (See Proviso, 7 Stats., 347.)

These special grants of these townships were *in addition* to their rights, in common with the other New York Indians in the 500,000 acre tract, and were intended not only to compensate them for the trouble of moving, etc., but were in conformity with an agreement entered into between the Indians on January 8, 1825, by which the Brothertown Indians purchased from the other New York Indians a special reservation, and after allowing to each of the other tribes a separate reservation of like size, provided for the holding of all the balance in common. This agreement is set forth in a note in Senate Document No. 189 of the Second Session of the Twenty-Seventh Congress, and was made part of the Record in the Court of Claims.

Under this agreement the Brothertowns, Stockbridges and Munsees, and Oneidas, occupied their separate reservations, and when the Treaty of 1831 was made, it was found that the reservations of the Brothertowns and Stockbridges and Munsees fell without the 500,000 acre tract,

while that of the Oneidas fell within it. Hence to compensate the Brothertowns and Stockbridges and Munsees the separate townships were granted to them, and later when the Treaty of Buffalo Creek of January 15, 1838, was entered into these townships were not included, nor was the Oneida reservation. This, as has already been shown, was reserved from the cession to the United States in Article 1 of that Treaty. These four tribes were entitled to special consideration because of their efforts in securing and settling the Wisconsin lands; and all the other negotiations between these Wisconsin tribes and the United States, referred to in the brief of the Attorney-General, had reference either to these special reservations or to the regulation of the internal affairs of these tribes.

Fourth. The parties to the Treaty of Buffalo Creek recognized the fact that the numbers of the various tribes as enumerated in Schedule A, had increased since the time that enumeration was made, and hence the grant was made greater than 320 acres each for the number of Indians named in the schedule, but as it was assumed that the increase would naturally be about the same, this schedule was used as a basis for a proportionate distribution. This excess may also have been due in part to the belief that there were some straggling New York Indians who had not been enumerated, for the grant in Article 2 was to "all the New York Indians now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes."

Fifth. The attempt to reduce the amount of the award by the amount that would be the share of the 176 miserable Indians who undertook to go to Kansas, and who either

died from exposure or were forced to return home, needs no answer. It only serves to show the spirit in which this claim is being contested by the present representatives of the Government.

GUION MILLER,
GEORGE BARKER,
For the Appellants.

JOSEPH H. CHOATE,
JAMES B. JENKINS,
JAMES H. MCGOWAN,
Of Counsel.



P. Arch. 106.

Brief of Atty. Gen. for Appellee, *James H. Wney, Clerk.*

Filed Oct. 20, 1896.

In the Supreme Court of the United States

OCTOBER TERM, 1896.

THE NEW YORK INDIANS, APPELLANTS, }
v. } No. 415.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

| | |
|-----------------------------------|------------|
| THE NEW YORK INDIANS, APPELLANTS, | } No. 415. |
| <i>v.</i> | |
| THE UNITED STATES. | } |

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

This suit was brought under a special act of Congress to enforce an alleged liability of the United States under the treaty of Buffalo Creek, made January 15, 1838, amended by the Senate June 11, 1838, assented to in its amended form by certain tribes, and finally proclaimed April 4, 1840. This alleged liability is, first, for the value of certain lands in the present State of Kansas, set apart for the New York Indians by that treaty, but

not granted to them by patent as contemplated by the treaty, which lands were never occupied by the said Indians (except temporarily as to a very small portion), but were ultimately sold by the United States for its own benefit; secondly, for the unexpended balance of a fund of \$400,000 agreed to be appropriated for the benefit of the Indians in connection with their proposed emigration to these lands, which emigration never took place, except to a very slight extent; and thirdly, for certain annuities and other moneys agreed to be paid to certain of the tribes upon their emigration.

Any intelligible statement of the provisions of the treaty of Buffalo Creek, and of the manner in which and the extent to which it was acted upon by the parties thereto, necessarily involves a brief review of the events which occurred before it was made. It must therefore be first observed that in 1821 the Menominee and Winnebago nations, with the President's approval, granted their Indian title, or right of occupancy, in certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations of Indians of New York, and the St. Regis, Stockbridge, and Munsee tribes, reserving to the grantors, however, hunting and fishing rights. The Six Nations were an Indian confederation, composed at one time of the Seneca, Cayuga, Onondaga, Oneida, Tuscarora, and Mohawk tribes, but since about 1789 the Mohawk tribe had resided in Canada, and the phrase "Six Nations of New York Indians" referred merely to the five other tribes just mentioned. The St. Regis, Stockbridge, Munsee, and Brothertown

tribes were, in 1821, Indian tribes residing in New York, but *not* belonging to the "Six Nations."* The consideration for the above-mentioned grant was only \$2,000, of which sum the Stockbridges paid at least \$900, and the Oneidas and Tuscaroras at least \$600, but by what tribes the balance was paid does not appear. (Rec., pp. 7-8.)

In 1822 the Menomonees, with the President's approval, granted an Indian title, or right of occupancy, in an undefined tract of about 5,000,000 acres adjoining the above, to the Oneida, Tuscarora, St. Regis, Stockbridge, and Munsee tribes, reserving, however, to the grantors the right of occupancy in common with the grantees. The consideration, \$3,000, was paid by the St. Regis, Stockbridges, Munsees, and Brothertowns, which latter tribe was, in 1825, admitted to share in the benefits of this grant. (Rec., pp. 8-9.)

The validity and effect of these grants being in dispute between the parties thereto, the United States made treaties with the Menomonees in 1831 and 1832, which

* On page 2 of the appellants' brief a list is given of all the tribes who claimed to have been parties to the treaty of Buffalo Creek, and to whom the jurisdictional act applied, several of the tribes being named more than once, but with slightly different appellations. The list closes with the statement, "These Indians are, in legal effect, the well known Six Nations." Nothing in the findings of the court below, nor in any treaty, warrants this statement. The court has found that the Seneca, Cayuga, Onondaga, Oneida, Tuscarora, and Mohawk tribes composed the Six Nations in 1780, and that the Mohawks afterwards withdrew. It has *not* found, and there is nothing in the record to warrant the assertion, that the St. Regis, Stockbridge, Munsee, and Brothertown tribes, or any of them, belonged to the Six Nations, and the language of the various treaties shows that they did not.

treaties were assented to by the New York Indians, and provided as follows :

(1) In consideration of \$20,000, paid by the United States to the Menomonees, a certain tract of 500,000 acres at Green Bay, Wisconsin (on a part of which some of the New York Indians, chiefly, if not exclusively, Oneidas, had already settled), was ceded to the United States for the benefit of the New York Indians of the Six Nations and the St. Regis tribe, to be held by the latter by the same tenure as the Menomonees had held it, provided the New York Indians actually occupied the lands within such time as the President should appoint. All portions of the tract not so occupied within that time were to become the absolute property of the United States.

(2) For another consideration the United States bought of the Menomonees a tract of about 2,500,000 acres, including a portion of the 5,000,000-acre tract covered by the Menomonee grant of 1822, above mentioned, and out of these 2,500,000 acres the United States granted three townships on the east side of Winnebago Lake to the Stockbridge, Munsee, and Brothertown tribes. As these tribes had already settled under the Menomonee grant of 1822 on another part of the tract purchased by the United States, they were, in addition, compensated for their improvements. (7 Stats., 342, 405.)

No considerable emigration of the New York Indians to Wisconsin seems to have taken place after 1832, so that in 1838 the location of the various tribes was substantially as follows: The Senecas, Cayugas, and two-

fifths of the Onondagas lived on the four Seneca reservations in New York; the Tuscaroras, three-fifths of the Onondagas, about half the Oneidas,* and the St. Regis on the respective reservations of these tribes in New York; the other half of the Oneidas on a portion of the 500,000-acre tract at Green Bay, Wisconsin; and the Stockbridges, Munsees, and Brothertowns in the three townships east of Winnebago Lake in Wisconsin. The right of preemption of the land contained in the four Seneca reservations, and in nearly a third of the Tuscarora Reservation, was in the Ogden Land Company, of which Thomas Ludlow Ogden and Joseph Fellows were trustees, the State of New York having the right of preemption as to the Oneida, Onondaga, and St. Regis reservations, and about two-thirds of the Tuscarora Reservation being owned by that tribe in fee simple. (Rec., pp. 10, 22-24.)

The President never set any limit to the time within which the Indians might remove to the Green Bay lands (as he was required to do under the treaty of 1831), nor did the United States take possession, under that treaty, of the unoccupied portions of those lands; but in 1838 a new treaty was made (called the treaty of Buffalo Creek), which was amended and conditionally ratified by the Senate on June 11, 1838, and assented to, as amended,

* In "Schedule A," annexed to the treaty of Buffalo Creek (7 Stats., 556), the Oneidas at Green Bay are said to number 600, and the Oneidas in New York 620. In Schedule A as printed in the opinion of the court below (Rec., p. 30), the words "Oneidas in New York . . . 620" have, by some clerical error, been omitted, and should be supplied.

by certain tribes, whose declarations of assent were declared satisfactory by the Senate on March 25, 1840, whereupon the treaty was proclaimed by the President on April 4, 1840. The preamble to this treaty declares that it is "entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men, and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing within such time as the President shall appoint." The tribes whose chiefs, head men, and warriors signed the original treaty were the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, Oneidas in New York, Oneidas at Green Bay, and St. Regis. The Senate resolution of June 11, 1838, declared that the treaty, as amended, should not be binding on any of the tribes or bands until it had been submitted to each tribe separately in council and fully explained by a commissioner, and freely assented to by the tribe, but that each assenting tribe or band should be bound by the treaty, although other tribes or bands might refuse their assent. The assents appended to the amended treaty are those of the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, Oneidas in New York, and St. Regis. (7 Stats., 550-564; Rec., p. 16.) Other arrangements, which will be referred to below, were made by treaty and statute with the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns. The provision in the preamble for the subsequent assent, in writing, by tribes

who did not originally execute the treaty appears never to have been made use of.

The treaty provided as follows :

The Indians who were parties to the treaty, "in consideration of the premises above recited and the covenants hereinafter contained," ceded to the United States all their right, title, and interest in the 500,000-acre tract at Green Bay, except a certain reservation therein described, upon which a portion of the Indians resided.

The United States, "in consideration of the above cession, * * * and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," agreed to set apart a certain tract of 1,824,000 acres, described by certain bounds, in what was then the Indian Territory, but is now the State of Kansas, "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin or elsewhere in the United States who have no permanent homes. * * * To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with" the act of May 28, 1830, § 3, it being "understood and agreed that the above-described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brother-towns, residing in the State of New York." (Art. 2.) The original treaty added, "and at Green Bay," but these words were struck out by the Senate. (Rec., p. 11.)

The lands secured to the Indians by patent* were never to be included in any State or Territory of the Union. (Arts. 2, 4.)

It was agreed that "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time appoint, shall forfeit all interest in the lands so set apart to the United States." (Art. 3, originally 7.) Such acceptance and agreement were made by the Senecas for themselves and the Cayugas and Onondagas residing with them (Art. 10), by the Oneidas in New York (Art. 13), and by the Tuscaroras (Art. 14). The Oneidas at Green Bay and the St. Regis did not accept the country nor agree to remove, but it was provided that any individuals of those tribes who so wished should "be at liberty to remove to the said country at any time hereafter within the time specified in this treaty." (Original Art. 19, Rec., p. 14; Supplemental Art., 7 Stats., 561.) All special provisions for the Oneidas at Green Bay were, however, struck out by the Senate. (Rec., 14.)

By the original treaty the United States stipulated and agreed to remove all the Indians to their new homes.

* In the appellants' brief, page 6, occurs this statement:

Thirdly, The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

This is a misrecital of the treaty, which provided that "the lands secured to them *by patent* under this treaty" (language which has no reference to any lands other than those for which patents were issued) should not be so included. A similar misrecital occurs on page 17 of the same brief.

and to supply them with provisions for one year after their arrival there; but any chief who was judged competent to remove himself and his family might do so independently and receive a commutation. The United States also agreed to erect council houses, churches, schoolhouses, etc., and to provide farming utensils, looms, etc. The Senate struck out all these provisions (Rec., pp. 12-14) and substituted a new article, agreeing to appropriate \$400,000, "to be applied from time to time, under the direction of the President of the United States, in such proportions as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes and supporting themselves the first year after their arrival; to encourage and assist them in education," etc. (Art. 15.)

Special provisions were made for each of the tribes and bands that signed the original treaty, these provisions including in each case a promise to pay money (expressly stated in the case of the Oneidas and St. Regis to be for expenses incurred in connection with the Green Bay lands), certain of which payments were to be made after the Indians had emigrated. All payments not contingent on emigration were ultimately made, as also certain payments to individual Indians who emigrated. (Rec., 21.)

Simultaneously with the original execution of the treaty the Senecas, by a deed annexed to the treaty, sold to Ogden and Fellows all four of their reservations, the purchase money to be held by the United States and invested, and the income to be paid to the tribe. (Schedule

C; Art. 10.) The Tuscaroras also, by a deed annexed to the treaty, made a similar sale of that portion of their reservation to which the Ogden Land Company had the right of preemption, while that portion which the tribe held in fee was conveyed to the United States, in trust to sell and convey the same and invest the proceeds. (Schedule C; Art. 14.)

The Senate resolution of June 11, 1838, under which, as well as under that of March 25, 1840, the treaty was finally proclaimed, provided as follows:

Provided further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

Both before and after the treaty was finally proclaimed many of the Indians protested against its being carried out. These protests came especially from the Senecas, the Cayugas and Onondagas residing with the Senecas, and the Tuscaroras, all of which tribes lived on reservations which were sold to Ogden and Fellows (in the case of a part of the Tuscarora Reservation, to the United States) when the treaty was made. The Senecas and Onondagas requested that no appropriation be made to carry out the treaty, and asserted that they would never emigrate. The Tuscaroras declared that the tribe as a whole would not part with its reservation or remove from it, whatever a few individuals might do. These protests alleged that the chiefs who signed the treaty had been corruptly induced

to do so by an agent of the preemption owners, and that the great majority of the Indians wished to remain in New York. The Onondagas at Onondaga, a tribe which does not appear upon the face of the treaty as having either signed it originally or assented to it as amended, and in whose reservation the Ogden Land Company had no rights, declared officially that they would not remove. (Rec., 18, 19.)

In 1842 Ogden and Fellows made a new agreement with the Senecas, reciting the fact that the provisions in the former deed had never been carried out, and providing as a compromise that the Buffalo Creek and Tonawanda reservations only should be sold to Ogden and Fellows, while the tribe should "continue in the occupation and enjoyment" of the Cattaraugus and Allegany reservations, with the same right and title that they had had before the deed of 1838. The purchase money was proportionately reduced, but the disposition of it remained the same. By treaty of even date therewith, proclaimed August 28, 1842, the United States consented to the provisions of the new deed, and agreed that "any number of the [Senecas] who shall remove from the State of New York under the provisions of the [treaty of 1838] shall be entitled in proportion to their relative numbers to all the benefits of the said treaty." (7 Stats., 586-591.) Thereupon the Indians on the Buffalo Creek Reservation withdrew to the Cattaraugus and Allegany reservations. The arrangements as to the purchase money were carried out, and the resulting income has been regularly paid to the Indians. (Rec., pp. 19, 21-22.)

The act of March 3, 1843 (5 Stats., 612), appropriated \$20,477.50 "for the removal to the west of the Mississippi of 250 of the New York Indians of the Seneca, Cayuga, and Onondaga tribes, and for fulfilling other treaty stipulations with them: *Provided*, That so many are willing to emigrate."

In 1845 Abram Hogeboom was appointed an agent to remove to the lands set apart under the treaty of 1838 such of the New York Indians as wished to go, some of the Indians having previously applied to the Government to have the proper steps taken for their removal to those lands. He mustered 271 for emigration, but when the party started in 1846 only 198 left New York, and only 191 arrived on the land, 17 others arriving subsequently. Out of the appropriation of 1843 \$9,797.11 were expended upon these Indians before, during, and after their journey. Eighty-two of these Indians died and 94 returned to New York. (Rec., pp. 19, 21.)

On June 2, 1846, while the emigration party was on its way, a council of the Senecas and the Cayugas and Onondagas residing with them (to which council the Tuscaroras were summoned, but they did not attend) was held at Cattaraugus. The commissioner representing the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. He also reported that he held an enrollment for two full days, but that only seven persons enrolled themselves for emigration, and these stated that five others wished to go. (Rec., pp. 19-20.) Since that

time all the New York tribes have remained on the reservations they then held, except that a part of the Oneida Reservation was sold to the State of New York, and a part of the tribe joined their brethren at Green Bay. (Rec., pp. 18, 22-23.)

The Tonawanda band of Senecas did not remove from their reservation after its sale to Ogden and Fellows by the indenture of 1842. That indenture had required an appraisal of the land and improvements, and in 1857 it was held in *Fellows v. Blacksmith* (19 How., 366, 372), that, under the treaty of 1842, it was the duty of the United States to have the appraisal made. As there could be no payment until the sum to be paid was determined by the appraisal, and as Ogden and Fellows were not entitled to require a surrender of the land until the money found due by the appraisers was paid or ready to be paid, this decision virtually declared the United States liable for the nonremoval of the Tonawanda band. It is a matter of history that by 1857 the land set apart by the treaty of 1838 had been largely occupied by white settlers, who would have had to be forcibly ejected before the Tonawandas could have been settled there. On November 5, 1857, the United States made a treaty with the Tonawanda band (proclaimed March 31, 1859) under which, in consideration of \$250,000 (part of which was used to purchase for the band the fee simple title to a large part of the Tonawanda Reservation), the Tonawanda band, numbering 650 persons, relinquished all claim to the lands set apart by the treaty of 1838 and all right to be removed thither, and to support and assistance after such removal. (11 Stats., 735.)

After the proclamation of the treaty of 1838 the United States took possession of and subsequently disposed of the balance of the 500,000-acre tract at Green Bay over and above that portion which was occupied and retained by the Indians, as provided in the treaty. (Rec., p. 20.)

In 1859 the Secretary of the Interior had the lands set apart by the treaty of 1838 surveyed. Thirty-two of the New York Indians were then resident on these lands, and allotments of 320 acres each (the quantity fixed by the proviso to the Senate resolution of June 11, 1838, above quoted) were made to them. On December 3 and 17, 1860, the President proclaimed the balance of the land to be part of the public domain, and it was subsequently sold as such. (Rec., pp. 21, 20.) The act of February 19, 1873 (17 Stats., 466), provided that any of the allottees who still resided on their allotments should obtain patents for them, and that the balance of the allotted land should be sold to *bona fide* occupants thereof, the purchase money to go to the allottees, provided they claimed it within five years.

The arrangements with the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns (none of which tribes or bands appear on the face of the treaty of 1838 as having assented thereto after its amendment, as required by the Senate, while only the Oneidas appear on the face of the treaty as having originally executed it) were as follows:

The Oneidas at Green Bay ceded, by a separate treaty in 1838, all their title to the 500,000-acre tract at Green Bay, except a certain reservation, which was ultimately

set off, and was treated as if it were the reservation excepted from the cession in the Buffalo Creek treaty, being of substantially the same size, though not bounded by precisely the same lines. (Treaty of Feb. 3, 1838, 7 Stats., 566; Rec., p. 20.)

By the treaty of September 3, 1839 (7 Stats., 580), part of the Stockbridge and Munsee Reservation east of Winnebago Lake was sold, and the emigration of such as should wish to emigrate was provided for. The acts of March 3, 1843 (5 Stats., 645), and August 6, 1846 (9 Stats., 55), provided for the division of the rest of the reservation in severalty, but were not wholly, if at all, carried out. The treaty of November 24, 1848 (9 Stats., 955), also provided for disposing of their land and for the emigration of those Indians who did not become citizens. Under the treaty of February 5, 1856 (11 Stats., 63), the unsettled portion of the Stockbridge and Munsee tribes removed to other lands in Wisconsin, which the United States obtained from the Menomonees by the treaty of February 11, 1856 (11 Stats., 679).

By the act of March 3, 1839 (5 Stats., 349), the Brothertown Reservation east of Winnebago Lake was divided among the Indians in severalty, and they were admitted to citizenship.

Upon the action of the Secretary of the Interior in 1859 in having the lands set apart by the treaty of 1838 surveyed, all the tribes who appear on the face of that treaty as parties thereto, as well as the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns, who do not so appear, employed counsel to prosecute their alleged claims for the value of

these lands and for their alleged share in the fund of \$400,000 mentioned in the treaty, and they have since asserted their claims. All of these tribes and bands are parties to the present suit.

On January 6, 1896, the Court of Claims entered judgment dismissing the petition in this case, whereupon this appeal was taken.

II.

BRIEF OF ARGUMENT.

The question raised by this appeal is whether the failure of the tribes who were parties to the treaty of Buffalo Creek of 1838 to emigrate to the land set apart for them by that treaty entitled the United States to dispose of the land not allotted to the 32 Indians remaining thereon in 1859, and to retain the unexpended balance of the money appropriated for the removal of the Indians and the fulfillment of treaty obligations with them, and also released it from the obligation to appropriate for the same purpose any further portion of the promised \$400,000, and to pay to the Cayugas and Onondagas residing with the Senecas, and the Tuscaroras, the unpaid balances of certain sums and the annual income of other sums, stipulated in each case to be paid to them on their removal to the West. The court below has decided that the substantially complete failure of emigration did relieve the United States from all obligation to give either land or money to any Indians but those who actually emigrated and remained on the land, and as the petition did not concern itself with the rights of these latter, which, as

regards land, were sufficiently protected by the *Act of February 19, 1873* (17 Stats., 466), it has been dismissed.

That the party who emigrated under Hogeboom, together with a few individuals who went subsequently, comprised all those Indians who desired to emigrate, and that very few even of this party remained on the land, is sufficiently established by the findings, so that the judgment of the court below would seem to be amply warranted by the facts. The judgment having been appealed from, however, it is necessary to study the case closely, which is best done with reference to four points, viz:

1. The consideration for the covenants of the United States in the treaty.
2. The character of those covenants.
3. The course pursued by both parties.
4. The rights of both parties in consequence of that course.

1. The consideration for the covenants of the United States.

As to this point it is submitted—

THE SUBSTANTIAL CONSIDERATION FOR THE COVENANTS OF THE UNITED STATES IN THE TREATY OF BUFFALO CREEK OF 1838, TO SET APART LAND IN THE WEST FOR THE INDIANS, AND TO APPROPRIATE MONEY IN AID OF THEIR REMOVAL THITHER AND PERMANENT SETTLEMENT THERE, WAS THE PROMISE OF SUCH REMOVAL AND SETTLEMENT WITHIN FIVE YEARS (A PERIOD WHICH THE PRESIDENT COULD EXTEND IF HE SAW FIT), WHICH REMOVAL AND SETTLEMENT THE

UNITED STATES WAS NOT REQUIRED, NOR IN POINT OF FACT ENTITLED, TO COMPEL BY FORCE, EXCEPT ORIGINALLY IN THE CASE OF THE INDIANS ON THE SENECA RESERVATIONS, AND THIS EXCEPTION WAS REMOVED BY THE TREATY OF 1842.

The preamble of the treaty recites the desire of the Indians "to seek a new home among their red brethren in the West," their purchases from the Menomonees and Winnebagoes of lands at Green Bay, in Wisconsin, the difficulty and contention that resulted, the treaties between the United States and the Menomonees, whereby 500,000 acres were "secured to the New York Indians of the Six Nations and the St. Regis tribe as a future home, on condition that they all remove to the same within three years or such reasonable time as the President should prescribe," and their failure in great part to remove. It further states—

And they therefore applied to the President to take their Green Bay lands and provide them a new home among their brethren in the Indian Territory. And whereas the President being anxious to promote the peace, prosperity, and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian Territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

The first article provides that the tribes who are parties to the treaty, "in consideration of the premises above recited, and the covenants hereinafter contained, to be

performed on the part of the United States, hereby cede and relinquish to the United States all their right, title, and interest to the lands secured to them at Green Bay," except a certain tract; while the second article provides that "in consideration of the above cession and relinquishment on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," the United States agree to set apart a certain tract of country; and subsequent articles contain further covenants based manifestly upon the same consideration.

Taking the whole treaty together, it is clear that the consideration for the covenants of the United States was twofold, viz., first, the removal of the Indians in accordance with the "policy of the Government," or, as it is expressed in the article containing the agreement to set apart this land, "in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians," and, second, the cession of all the Indians' right, title, and interest in the unoccupied portion of the 500,000-acre tract at Green Bay. What the latter consideration amounted to will first be examined.

The value of the cession of the right, title, and interest of the Indians in the lands secured to them at Green Bay necessarily depends upon the character of such "right, title, and interest." This may be gathered from the terms of the Menomonee treaty of 1832, read in the light of the intertribal treaties which preceded it. By those intertribal treaties (Rec., 8-9) the Six Nations and

the St. Regis, Stockbridge, and Munsee tribes had acquired for \$2,000 an Indian title to 500,000 acres near Green Bay, subject to the fishing and hunting rights of the Menomonees and Winnebagoes, while two of the Six Nations, viz, the Oneidas and Tuscaroras, together with the St. Regis, Stockbridge, Munsee, and Brothertown tribes, had acquired for \$3,000 an Indian title, in common with the Menomonees, to 5,000,000 acres adjoining the former grant. These cessions were approved by the President, because otherwise they would have been futile.

The United States held the fee of the Menomonee and Winnebago lands, as of all Indian lands outside the boundaries of the thirteen original States, subject only to the Indians' right of occupancy (*Beecher v. Wetherby*, 95 U. S., 517, 525), so that without its permission the Menomonees and Winnebagoes could not have transferred the right of occupancy, for otherwise as soon as they withdrew from the actual possession, which alone constituted their title, the title of the United States to these lands would have become complete (*Cherokee Nation v. Georgia*, 5 Pet., U. S., 17). The legal power of the President alone, without authority of Congress, to waive the right of the United States to assert its absolute fee simple title to lands which one Indian tribe undertakes to cede to another may be questioned, but it was probably taken for granted, the matter being thought to be of small importance; and the subsequent action of Congress may be regarded as a tacit approval.

The intertribal treaties established no boundaries between the Wisconsin and the New York tribes, but created (the first treaty practically and the second by

express terms) a tenancy in common between the grantors and the grantees. It is therefore not surprising that "much difficulty arose from the negotiations," and that "the claims of the respective parties were much contested, as well with relation to the tenure and boundaries of the two tracts as to the authority of the persons who signed the agreement on the part of the Menomonees." By the treaty of August 11, 1827 (7 Stats., 303), however, from which the words of the preceding sentence have been taken, the Menomonees and Winnebagoes referred the whole matter to the President for final decision, authorizing him "to establish such boundaries between them and the New York Indians as he may consider equitable and just." Accordingly the rights of the New York Indians in the Wisconsin lands were settled by the Menomonee treaties of February 8, 1831, and October 27, 1832 (7 Stats., 342, 405), to which the New York Indians assented.

The Menomonees, "always protesting that they are under no obligation to recognize any claim of the New York Indians to any portion of their country, that they neither sold nor received any value for the land claimed by these tribes" (7 Stats., 343), would yield nothing without payment, and accordingly, on payment of \$20,000 (four times as much as the New York Indians previously had paid) by the United States, the Menomonees ceded to the United States a certain tract of 500,000 acres at Green Bay for the benefit of the New York Indians. In the treaty of 1831 (7 Stats., 342-347), the beneficiaries of this grant were stated to be "the New York Indians," which designation includes the Stockbridges, Munsees,

and Brothertowns. The Senate, however, in ratifying this treaty, provided "that for the purpose of establishing the rights of the New York Indians on a permanent and just footing," certain other pieces of land should be set off for the Stockbridges, Munsees, and Brothertowns, and the 500,000 acres at Green Bay, the location of the tract being somewhat changed from that proposed in the treaty, should be set apart for "the Six Nations of the New York Indians and the St. Regis tribe," instead of for all the New York Indians, as originally proposed in the treaty. (7 Stats., 347-8.)

By the treaty of 1832 the Menomonees acceded to this plan, except as to the location of the 500,000-acre tract, as to which a further change was made, so that it seems clear that the final grant of that tract to the United States was made for the benefit of the Six Nations and the St. Regis tribe exclusively. Hence when the treaty of 1838 (7 Stats., 550) recites that "500,000 acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe," it means precisely what it says, and refers only to those particular New York Indians and not to any others.

The 500,000 acres were to be held by the Six Nations and the St. Regis "under such tenure as the Menomonee Indians now hold their lands" (7 Stats., 343), provided that if they should neglect or refuse to remove from New York and settle on the lands within such reasonable time as the President should prescribe, all the lands which they should not have actually settled upon should be and remain the property of the United States. (7 Stats., 347.)

By the treaty of 1831 the Menomonees also ceded to the United States about 2,500,000 acres east of Green Bay and Fox River "in consideration of the kindness and protection of the Government of the United States, and for the purpose of securing to themselves and posterity a comfortable home." (7 Stats., 343). The details of this consideration are set out in the fourth article (7 Stats., 344-5), and include the building of houses, mills, and a blacksmith's shop, education, clothing, provisions, etc. As the Stockbridges, Munsees, and Brothertowns had settled on a part of this land, the United States, in accordance with the Senate resolution above referred to, gave them three townships on the east side of Winnebago Lake, paying the Stockbridges and Munsees \$25,000 for their improvements, and the Brothertowns \$1,600. (7 Stats., 347-8, 405-6.)

The results of these two treaties may be summed up thus: The "Six Nations" (i. e., the Senecas, Cayugas, Onondagas, Oneidas, and Tuscaroras—the Mohawks having withdrawn to Canada after the Revolution) and the St. Regis acquired, at the cost of the United States, an undisputed Indian title to the 500,000-acre tract at Green Bay, conditioned on their actual settlement thereon within such reasonable time as the President should prescribe, the United States, in case the Indians did not all remove within such reasonable time, to come into possession of all the unoccupied portion of the tract. The Stockbridges, Munsees, and Brothertowns acquired an undisputed Indian title to three townships east of Lake Winnebago, but no interest in the 500,000-acre tract, which,

as the treaty of Buffalo Creek itself expressly states, was secured to "the New York Indians of the Six Nations and the St. Regis tribe," a description which excludes the Stockbridges, Munsees, and Brothertowns.

Between the respective dates when the treaty of 1832 and the treaty of 1838 were made, a "reasonable time" for the complete emigration of the New York Indians had elapsed, but there had been no substantial emigration to the 500,000-acre tract, except by the Oneidas, nearly half of whom had gone, and they occupied that portion of the tract which was afterwards excepted from the cession in article 1 of the treaty of 1838. As to the balance of the tract, the President could at any time (under the treaties of 1831 and 1832, to which the New York Indians had assented) have set a very short limit to the period allowed for emigration, and on its expiration the United States would have had a complete title to all unoccupied portions of the tract. When, therefore, the New York tribes in 1838 ceded all their right, title, and interest in the greater part of the 100,000-acre tract, they merely surrendered an Indian title of which they could at any time have been deprived on very short notice. Their cession amounted to little, if anything, more than saving the President the trouble of fixing a date after which the land would have become the property of the United States in any event.

As each tribe of "the Six Nations and the St. Regis tribes" had an equal interest, under the treaty of 1832, in the 500,000-acre tract, the question of which tribes had paid, and in what proportions, for the attempted ac-

quisitions of 1821 and 1822 is only important as showing that the various tribes were not at all equally concerned in the project of emigration to Wisconsin. The total amount paid for these attempted acquisitions was only \$4,950 (\$2,000 under the intertribal treaty of 1821 and \$2,950 under that of 1822), of which the Stockbridges, Munsees, and Brothertowns (who did not belong to the Six Nations) paid \$2,850, the St. Regis \$1,000, the Oneidas \$400, and the Tuscaroras \$200, leaving unidentified \$500 in cash. (Rec., 8, 9.)

The fact that nearly half the Oneidas emigrated to Green Bay indicates that this last sum was probably paid by them. The findings do not show that the Senecas, Cayugas, and Onondagas ever paid a dollar to secure any rights in lands in Wisconsin, while Finding II states expressly that "the Senecas subsequently denied that they had any title to any lands in Wisconsin," and that "it does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860," the date when the tribes first began to allege that the cession of their defeasible rights in the Wisconsin land was the substantial consideration for the grant of the Kansas lands. When, therefore, the Senecas, and the Cayugas and Onondagas residing with them, joined in the cession of all right, title, and interest in the unoccupied portion of the 500,000-acre tract, they ceded what cost them nothing and what they seem never to have intended making any use of. The same is substantially true of the St. Regis and New York Oneidas, for the former received \$5,000 and the latter \$6,000 under the Buffalo Creek treaty (articles 9 and 13)

in reimbursement of all their expenses in connection with the Wisconsin lands. (Rec., 21.)*

These facts emphasize the totally nominal interest which the Indians in New York had in the Green Bay lands in 1838, and hence the totally nominal and unsubstantial character of their cession of rights in those lands, when viewed as a consideration for the Government's promise to set apart the Kansas lands. The rights which the tribes ceded were rights for which some of them had paid nothing, even in the first ineffectual attempts to

* In this connection it may be well to call attention to a patent error of statement in the opinion of the court below. (Rec., 26.) The opinion reads:

The defendants have complied with the specific obligations assumed by them under this treaty to this extent alone. In 1846 they removed some 200 or more Indians to the new reservation (all, apparently, who wished to remove), and paid therefor the sum of \$9,461.08; they allotted to 32 of these Indians 10,240 acres of land; in 1857 they secured from the Tonawanda band of the Senecas a release of all their rights under the treaty and in the lands, and paid them for this the sum of \$256,000. In no other way, so far as appears, have the United States attempted to carry out their obligations under the treaty of Buffalo Creek.

The last part of this statement overlooks certain facts established by Finding XVIII (Rec., 21), viz:

The following payments were *also* made under the treaty:

Under article 9, \$5,000 to the St. Regis tribe.

Under article 11 and Schedule C, \$1,500 to William King, he having emigrated in 1846.

Under article 13, \$6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.

Under article 14 and Schedule B, \$125 to James Cusick, he having emigrated in 1846.

The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows, contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to nonemigration the Indians have received the money in New York.

obtain some title to the land, while others of them were repaid all that they had spent in such attempts. They were rights which, whatever had been paid in 1821 and 1822, were a free gift from the Government in 1832. They were rights which, as the Indians had fully demonstrated, they had no desire to make use of. They were rights which the President could at any time have extinguished by simply notifying the tribes that they must at once make use of them or lose them. Such a cession (where nothing passed that the grantors valued or that the grantee might not have obtained without any further consideration at all) could not have been the real, substantial consideration for the reservation of lands in the Indian Territory and the other covenants of the United States; and this consideration must therefore have been the other consideration expressed in the treaty, viz, the removal of the Indians to the west of the Mississippi, in accordance with the then "policy of the Government" referred to in the preamble to the treaty. By articles 10, 13, and 14 all the assenting tribes except the St. Regis had specifically agreed to remove, as follows:

ARTICLE 10. It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract * * * and they [i. e., the Senecas, and the Cayugas and Onondagas residing with them] *agree to remove*—to remove from the State of New York to their new homes within five years and to continue to reside there.

ARTICLE 13. * * * and they [the Oneidas residing in the State of New York] *agree to remove* to their new homes in the Indian Territory as soon

as they can make satisfactory arrangements with the governor of the State of New York for the purchase of their lands at Oneida.

ARTICLE 14. The Tuscarora nation *agree* to accept the country set apart for them in the Indian Territory, and *to remove* there within five years and continue to reside there.

The treaty as originally executed entitled the United States to compel the performance of these agreements to remove the original third article, reading:

The United States stipulate and agree to remove all the New York Indians of the several tribes described in the foregoing article to their new homes. (Rec., p. 12.)

That this authorized a compulsory removal is clear from the fact that the only tribes who executed the original treaty without agreeing to remove, stipulated against a compulsory removal, as follows:

ARTICLE 19. * * * It is expressly agreed that if any of the [Oneida] Indians now at Green Bay wish to remove to the country set apart as their future homes, they shall be at liberty to do so. * * * This article shall not be construed to authorize the Government to compel them to remove. (Rec., pp. 14, 15.)

SUPPLEMENTAL ARTICLE. * * * And it is further agreed that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. (7 Stats., 561.)

Had the Government not possessed, under the original third article, the power to compel the Indians to remove,

these special restrictions upon the exercise of that power would not have been required. The Senate, however, doubtless in deference to the numerous protests against removal mentioned in Finding XI (Rec., p. 18), struck out that article, so that, as finally ratified and proclaimed, the treaty provided for a voluntary removal only.

The court below, it is to be observed, has not found it necessary to decide whether the treaty authorized a forcible removal or not,* the opinion reading as follows :

It [the treaty] said in substance to the Indians: If you wish to go West notify us and we will take you and provide for you; or, take the other argument, it empowered the President to order the Indians west if he deemed it wise to do so. * * * Perhaps the President had the power and technical right under the treaty of Buffalo Creek to surround the Indians with troops and force them away from their homes against their will, but it was not a power he must use, and it was not a power which the Indians wished him to use. (Rec., 41.)

That the Indians did not wish the President to use any such power is most certainly true. Their protests and

* In an earlier part of the opinion it would seem as if Davis, J., had at one time considered that the right of forcible removal existed, for he states: "It was the right of the Government, given it expressly by treaty, to cause the Indians' removal, but it never attempted to enforce that right." (Rec., p. 34.) As the question was manifestly left open, further along in the opinion, in the passages cited in the text from page 41 of the record, the retention in the opinion of the passage here cited from page 34 was obviously inadvertent, especially as the right of forcible removal, "expressly" given by the original treaty, had been stricken out on its amendment.

declarations and the action of the council in 1846 (Findings XI and XIII; Rec., 18, 19) amply warrant the conclusion reached by the court below on that point, and certainly, if there be any force in the maxim *volenti non fit injuria*, no court could uphold a suit brought by the Indians against the United States for following the precise course which the Indians desired should be followed. The court below would therefore have been fully justified in its ultimate conclusion that the United States could not be held liable for the failure of the Indians to emigrate, even if it were a fact that the treaty authorized a compulsory removal; but a study of the changes in the treaty makes it clear that no such authority existed, and the language of the court below, quoted above, shows an evident leaning to this view, although the decision of the point was not thought essential.

It has been stated above that the amended treaty of 1838 did not authorize a forcible removal of the Indians to the West, *except* in the case of those living on the Seneca reservations, which exception was done away with by the treaty of 1842. This exception necessarily resulted from the sale of all four of the Seneca reservations to Ogden and Fellows, with the approval of the United States, by the indenture of January 15, 1838, which was incorporated into the treaty. (7 Stats., 559.) The United States having approved this sale, it was incumbent upon it to see that it was carried out in good faith by both parties, and as such carrying out necessitated the removal of the Indians, the Government was required to remove them against their will, should they

persist in refusing to go, and should the purchasers insist on obtaining possession of the property. Hence, as the United States had a right to take the Indians forcibly from these four reservations, and as there was no other place for them to go to except the land which had been set apart for them in the West, it must be admitted that *these particular Indians* could, under the treaty of 1838, have been forcibly removed to the West.

With the execution of the indenture and treaty of 1842 (7 Stats., 586), however, the case was altered. The Cattaraugus and Allegany reservations being released from the sale, the Indians living on them were freed from all obligation to go elsewhere, and the United States was freed from all obligation to take them against their will. Moreover, while there was still a duty to effect a removal of the Indians from the Buffalo Creek and Tonawanda reservations, even against their will, this did not involve a right to remove them forcibly *to the West*, since these Indians, being Senecas, had as good a right to live on the Cattaraugus and Allegany reservations as had their brothers who were there already. The voluntary and peaceable withdrawal of the Buffalo Creek Senecas to the Cattaraugus and Allegany reservations (Rec., p. 19) released the United States from any further responsibility to Ogden and Fellows in regard to the Buffalo Creek Reservation, and if the Tonawanda Senecas had followed the same course, the result would have been similar.

In the case of the Tuscaroras, the United States never had, under the treaty of 1838 as amended, any right to

remove them forcibly to the west. What they had sold to Ogden and Fellows was less than a third of their reservation, and those living thereon, even if forcibly expelled therefrom by the United States, could have been placed on the other part of the reservation if they preferred going there rather than to the West. This other portion of the reservation had been granted to the United States, but merely as a trustee or agent for the purpose of a sale for the benefit of the Indians, who were owners in fee simple. Such agency was clearly revocable at any time before actual sale (and no actual sale ever took place), and neither the United States nor third parties had any interests which were entitled to be enforced by a compulsory removal of the Indians.

It was contended in the court below that the cases of *Fellows v. Blacksmith* (19 How., 366) and *State of New York v. Dibble* (24 *id.*, 366) were authority for holding that the treaty of Buffalo Creek entitled the United States to remove the Indians to the West by force, but a careful examination of those cases makes it clear that they can not be regarded as furnishing any real authority for such a proposition. Both these cases concerned the rights of the purchasers of the Indian title to the Tonawanda Reservation, under the indenture of May 20, 1842 (7 Stats., 587), superseding that of January 15, 1838 (7 Stats., 557), as against the Indians, who had remained in possession of the entire reservation.

It was held, in the first case, that the purchasers could not expel the Indians by force, and, in the second, that they could not settle or reside upon the lands at all until

the Indians had removed, and, in fact, that their rights under the purchase and the treaty which approved it were to be decided, "not by the courts, but by the political power which acted for and with the Indians." That it was the duty of the United States to see that the contract between the Indians and Ogden and Fellows was carried out in good faith, and to that end to perform, for its part, whatever obligations the treaties of 1838 and 1842 cast upon it, will not be denied; but it is equally undeniable that if, as this court held in *State of New York v. Dibble*, the validity of those treaties, and of the indentures made in connection with them, to bind the Tonawanda band, was not a question to be decided by the courts as then constituted, but only by the United States, then the statements in the opinion in *Fellows v. Blacksmith* as to the duty of the United States in connection with the removal of the Indians in accordance with those treaties must be regarded as *obiter*, and not as authority on a point of law.

Moreover, the statements of Mr. Justice Nelson, in *Fellows v. Blacksmith*, as to the removal of the Indians, were not made with that accuracy which usually marks the opinions of this court. Nor, apparently, did the record in that case disclose all the facts bearing upon the question of removal. A striking instance of this is found in the words, "A large fund *was appropriated*, and *in the hands of the Government*, to be disbursed in aid of such removal, and of their support and encouragement after their arrival." (19 How., 371.) In point of fact, while

the treaty of 1838 had promised an appropriation of \$400,000 for those objects, only \$20,477.50 (*Act of March 3, 1843*, 5 Stats., 612) had ever been actually appropriated. While opinions have differed as to the constitutional power of Congress to refuse an appropriation called for by a treaty, it has never been suggested, and Nelson, J., can not be supposed to have meant, that a treaty could appropriate money without any Congressional action whatever. Hence this statement as to the appropriation is manifestly incorrect.

A more serious inaccuracy of Mr. Justice Nelson is the statement that the Senecas' "agreement [in the treaty of 1838] to remove to their new homes [in the West] * * * remained unaffected by the second treaty," that of 1842. As will be shown more fully below, the United States, in consenting that the Senecas should reacquire the title to two of their reservations and should remain in undisturbed possession thereof, necessarily released them from their agreement to remove to the West, and hence it was no breach of treaty for the Buffalo Creek Senecas to remove to the Cattaraugus and Allegany reservations (Rec., p. 19) instead of going West, nor would it have been any breach of treaty had the Tonawanda Senecas done the same, there being apparently land enough for them there to live as civilized human beings. This fact seems to have been wholly overlooked by Nelson, J., and hence his statements as to the duty of the United States to remove these Indians to the West, and what had usually been done in such cases, are peculiarly inappropriate, since the only Indians

then before the court were not bound to go to the West, but could have gone to Cattaraugus and Allegany just as well.

The reservation of the Tonawanda Senecas having been sold, with the Government's approval, it was, of course, the duty of the United States to see that the agreement was fulfilled, and therefore to remove the Tonawandas somewhere, either to the West or to the other Seneca reservations, even against their will; but the existence of this right of forcible removal, in the case of this particular band, does not imply any right to forcibly remove *to the West* the other tribes and bands in whose reservations third parties had no rights which required to be enforced.

The record in *Fellows v. Blacksmith* seems not to have disclosed the fact that the treaty of 1838 originally contained a provision for a forcible removal, which provision was struck out by the Senate, and that the stipulation of the St. Regis Indians against such a removal was made before the amendment of the treaty, and in view of that original provision. Had Nelson, J., been aware of these facts, he would not have referred (19 How., 372) to that stipulation as evidence of the existence of a right of forcible removal.

The Senate's abandonment of the power secured to the United States in the original draft of the treaty, to compel a removal of the Indians, necessitated two further changes in the treaty, one in the interest of the Indians and the other in that of the United States. The first was the provision in article 15 for an appropriation of

money, "to be applied under the direction of the President of the United States in such proportions as may be most for the interest of the said Indians, parties to this treaty," for certain purposes, one of which was "to aid them in removing to their homes." The other, which will be discussed more fully below, was a provision for the probable event of a merely partial emigration, and was made a part of the treaty in the form of a proviso to the first resolution of ratification, as follows:

Provided further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of \$400,000, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant 320 acres only. (Rec., p. 17.)

The adoption of this controlling proviso, along with the excision of the original section as to removal by the United States, demonstrates most clearly that the Senate did not intend that any of the Indians should be forced to remove against their will.

The proviso reads, "if any portion or part of said Indians do not emigrate, the President shall retain," etc. These words do not of themselves set any time limit to the exercise of the right to emigrate, and it was unnecessary that they should, that being set by the treaty itself. As the only emigration contemplated by the proviso was an emigration under the treaty, the treaty itself must be looked to to ascertain the limit of the time within which such emigration might take place. Article 3 (originally 7) of the treaty required an agreement "to remove * * *

within five years, or such other time as the President may, from time to time, appoint," and hence the agreements of the Senecas and others, in articles 10 and 14, expressly named five years as the time within which the respective tribes agreed to emigrate, while that of the New York Oneidas, in article 13, which names no particular time, must obviously be understood as made in view of the limit set by article 3, no other limit being authorized by any portion of the treaty. The same limit was also set in the case of the St. Regis tribe, whose individual members had the right to emigrate "within the time *specified* in this treaty" (7 Stats., 561), although the tribe had not itself agreed to remove. Lastly, while, as will be seen below, the Senecas, together apparently with the Cayugas and Onondagas residing with them, were ultimately released from their tribal agreement to remove, the treaty of 1842 (7 Stats., 590) accorded their members the right to emigrate "under the provisions of" the treaty of 1838, i. e., of course, within the time limited by article 3 of that treaty.

The meaning and effect of article 3 (originally article 7) will be best understood when the changes which the other parts of the treaty underwent at the hands of the Senate are taken into consideration. This article declared that such of the tribes as did not "accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit," etc. A change in the order of the words would have improved the language, but the meaning is sufficiently clear, viz,

that such of the tribes as do not *accept the country set apart for their new homes, and agree to remove thereto* within five years, or, etc., shall forfeit, etc. Under the original treaty this section restricted all interest in the Western lands to the tribes which accepted them and agreed to emigrate, but it imposed no forfeiture upon those tribes, because when once a tribe had accepted and agreed the United States was charged, under the original third article (Rec., p. 12), with the duty of seeing that this agreement was performed, and hence no forfeiture by any such tribe was possible. Should any of them refuse to keep their agreement the consequence was not to be forfeiture, but merely that they would be compelled to keep it in spite of their refusal. Should, however, the President find that it would be an unnecessary hardship to any tribe to be made to remove within the five years, although it had agreed so to do, he could extend the time.

In the case of the St. Regis tribe and the Oneidas at Green Bay the original treaty made an exception. Though they did not accept and agree, any of their members were allowed all the rights of members of the accepting tribes, in spite of the forfeiture provided in case of nonacceptance. (Suppl. art., 7 Stats., 561; original art. 19, Rec., p. 14-15.) The only effect of the original seventh article (now third) upon these tribes was to specify five years as the time within which any of their members might emigrate. Should the latter fail to do so within that time, they would lose the right to do so, unless the President saw fit to extend the time for them.

The Senate not only struck out the article containing the exception in favor of the Green Bay Oneidas, but also altered in a measure the effect of the original seventh article (now third) by striking out the original third article, which had charged the United States with the removal of the Indians. This left it optional with the Indians of the accepting tribes to remove or not as they saw fit, and if any of them failed to do so within five years as they had promised the consequence would not be, as originally provided, that they could be compelled to go, unless the President extended the time for them, but merely that they would lose their right of emigration altogether, unless the time were extended.

The appellants contend that article 3 did not limit, even provisionally, the time allowed for emigration, but required the President to fix a time. This contention practically strikes the words "five years or such *other*" out of article 3 and construes it as requiring merely an agreement to remove within such time as the President may from time to time appoint. It is submitted that such a construction violates the plain intent of the language used, and is wholly unwarrantable.*

* It may be as well to note in this connection an apparently inadvertent statement in the opinion of the court below as follows:

We have already seen that the Supreme Court holds that no time was fixed for removal (*Fellows v. Blacksmith, supra*), where the court said: "We hold that the performance of the conditions of the treaty was not a duty that belonged to the grantees, but to the Government under the treaty." (Rec., p. 35.)

Where it is said that "no time was fixed for removal," this obviously means not that no time was fixed *in the treaty*, but that the President fixed none, as the court below had "already" stated was the case. (Rec., p. 33.) What makes it clear that the statement

That article 3 set a limit of five years to the exercise of the right to emigrate is recognized by the language used in other parts of the treaty. The Senecas (for the Cayugas and Onondagas residing with them as well as for themselves), in article 10, and the Tuscaroras, in article 12, distinctly agreed to remove within five years, which they would certainly never have done had they understood article 3 as meaning that the time for removal was unlimited until the President should see fit to limit it. The supplemental article, executed by the St. Regis, refers to "the time specified in this treaty," and as no time was specified for removal except by article 3, these words must refer to that article as having specified, i. e., fixed, a time.

The words of article 3 are, "such other time as the President *may*, from time to time, appoint." Where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power, "may" in a

is inadvertent, however, is the fact that the opinion contains no previous reference to the decision in *Fellows v. Blacksmith* in that connection, but only in regard to the validity of treaties (Rec., p. 32); and, further, that the opinion in *Fellows v. Blacksmith* does not consider the question of the *time* for removal at all, but only the duties of the United States in regard to removal. Moreover, the passage from that opinion, quoted in the opinion of the court below, does not refer to the duties of the United States to the Indians, but its duties to "the grantees," i. e., the parties to whom the Senecas had granted and sold their Indian title to the Tonawanda Reservation. What that passage means is that the approval of that sale by the United States had bound it to see that the grantees were fairly treated and to have the appraisal made, whether the Indians opposed this or not. Neither this passage nor any part of that opinion refers to the fixing of a time for removal to the West.

statute is equivalent to "shall" (*Minor v. Mechanics' Bank*, 1 Pet., 46, 64; *Mason v. Fearson*, 9 How., 248, 259), but it can not be so regarded unless the context clearly warrants that construction. Here there is not only nothing to warrant it, but the context excludes the possibility of such a construction. If this article required the President to appoint a time for removal at all, it required him to do so from time to time as long as any Indians who might have removed had not done so, or in other words it required the United States to await the pleasure of the Indians in the matter for an unlimited period of time, which would have been manifestly absurd.

In support of their contention that the President was *required* to extend the time for emigration beyond five years, in case the Indians did not emigrate within that time, the appellants point (Brief, p. 21) to the Menomonee treaty of February 8, 1831, as amended, which provided—

That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them, and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers in such manner as he shall deem equitable and just. (7 Stats., 347.)

The appellants assert that the language in the Buffalo Creek treaty is *similar*, and must therefore be similarly construed. This assertion is startling, to say the least. While the provisions in the two treaties are similar up to a certain point, in this matter of the time for emigration they differ radically. The earlier treaty says "the President of the United States *shall* prescribe the time," while

the later treaty says "within five years or such other time as the President *may* from time to time appoint." The one required the President to fix the time; the other fixed it, permitting the President to extend it or not as he might deem best, and even to make several extensions, but not requiring any extension of the period whatever. This manifest difference between the Buffalo Creek treaty and that of 1831 was evidently due to the previous course of the New York Indians in the matter of emigration. Under the treaty of 1831, fixing no definite time for emigration, no substantial emigration took place, the removal to the Green Bay tract having mostly taken place before. In providing, by the treaty of Buffalo Creek, for a final settlement of the emigration question, it was obviously desirable to avoid all possible delay and uncertainty by fixing a definite period, and making the Indians understand that their *right* to emigrate would expire in five years, though authorizing the President as a matter of *grace*, or if he judged it necessary in order to carry out the Government's policy, to extend the time. The treaty of 1831 was made under the evident impression that the Indians wished to emigrate, and that of 1838 with full knowledge that many of them did not. In the one case it was thought unnecessary to fix a time; in the other it was thought necessary in order to bring matters to a conclusion; and the different circumstances under which the two treaties were made account for the different provisions.

The appellants assert (Brief, p. 22) that the Indians understood that their right to emigrate would continue

until the President fixed a time by affirmative action. The findings contain nothing to warrant this assertion. The language of the treaty is clear enough, and the declarations of assent to the amended treaty state that the whole treaty had been fully explained to each assenting tribe. Everything points to the conclusion that the Indians understood the treaty to mean just what it said, and that when they agreed to remove within five years they knew what the consequences of nonremoval would be.

2. The character of the covenants of the United States.

As to this point it is submitted—

BY THE AMENDED TREATY OF BUFFALO CREEK OF 1838, AS FURTHER MODIFIED BY THE TREATY OF 1842, THE UNITED STATES COVENANTED TO SET APART A CERTAIN TRACT OF COUNTRY FOR, AND TO APPROPRIATE MONEY TO AID IN THE REMOVAL AND SETTLEMENT OF, SUCH TRIBES AS ACCEPTED THE COUNTRY SET APART FOR THEM AND AGREED TO REMOVE THERETO WITHIN THE TIME SPECIFIED IN THE TREATY, AS WELL AS SUCH INDIVIDUALS OF THE SENECA TRIBE (INCLUDING APPARENTLY THE CAYUGAS AND ONONDAGAS RESIDING WITH THEM) AND THE ST. REGIS TRIBE AS SHOULD ACTUALLY REMOVE WITHIN THAT TIME, THE SAID LAND TO BE ULTIMATELY GRANTED TO THEM BY PATENT, PROVIDED THAT IF ANY PORTION OF THE INDIANS DID NOT EMIGRATE, THE PRESIDENT WAS TO RETAIN A PROPER PROPORTION OF THE MONEY TO BE APPROPRIATED, AND ALSO TO DEDUCT FROM THE QUANTITY OF LAND ALLOWED SUCH NUMBER OF ACRES AS WOULD LEAVE TO EACH EMIGRANT 320 ACRES ONLY.

THE ONEIDAS IN NEW YORK AND THE TUSCARORAS WERE THE ONLY TRIBES WHO ACCEPTED THE COUNTRY AND AGREED TO REMOVE THERETO, THE ACCEPTANCE AND AGREEMENT OF THE SENECAS, AND OF THE CAYUGAS AND ONONDAGAS RESIDING WITH THEM, HAVING BEEN REVOKED BY THE TREATY OF 1842.

The first thing to be noted in regard to the covenants of the United States is that the United States did not, either by the treaty of Buffalo Creek or subsequently, *grant* the land in question in the present suit to the New York Indians or any of them. The 10,240 acres allotted to the 32 Indians who remained on the land in the West may have been ultimately granted to *them*, but those 10,240 acres are not involved in the present suit, which concerns land that was set apart, reserved for a time, but never granted.

The language of the treaty itself is clear as to this. It reads:

The United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians * * * who have no permanent home, * * * which said country is described as follows, to wit: Beginning [etc.] * * * To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved the 28th day of May, 1830, with full power and authority [etc.].

This is not the language of a grant, but of a promise to reserve lands out of which grants might subsequently be made. The grants were to be by patent from the President, and until such patents issued there could be no grant, though performance by any tribe or nation of the Indians of its promise to accept and remove—the promise which constituted the real consideration for the covenants of the United States—would of course give such tribe or nation a right to demand a formal grant, or practically an equitable title to its share of the land. The treaty itself contains no words of grant, and the provision that the various tribes were “to have and to hold” their land “by patent,” not by the treaty, would never have been adopted had it been intended to grant the land by the treaty and not by the patents. The fact that a grant was promised, but not made, is recognized throughout the whole treaty. The land itself, whether the entire tract or such portions as were intended for particular tribes, is never referred to therein as the land “granted,” but always as “the country set apart” or “the tract set apart.” The one provision which was designed to enlarge the proposed grant beyond what was customary, and which therefore could not take effect until the grant was actually made, was the provision that the land should not be included in any State or Territory. (Art. 4.) Had the land been granted by the treaty this provision should have read “The lands *hereby granted* shall never be included in any State or Territory of the Union;” but instead of this it reads “The lands *secured to them by patent* under this treaty shall never be included,” etc., because until the lands were secured by

patent they were not granted, and until they were granted the provision as to noninclusion would not attach.

The whole tract intended to be set apart, and even the portions intended for the leading tribes, were sufficiently described in the treaty, so that patents would have been superfluous evidences of title had the grant been made by treaty, by "the law of the land."

The reason for not making the grant in the treaty itself, but requiring it to be made by patent, is to be found in the experimental nature of the treaty. The previous attempts to secure an emigration to Wisconsin had been only partially successful, and the language of the preamble shows that the framers of the Buffalo Creek treaty had the possibility of another failure in mind. The President was stated to be "anxious to promote the peace, prosperity, and happiness of his red children," and "determined to carry out the humane policy" of removal, and to bring them to "see and feel, by his justice and liberality, that it is for their true policy and for their interest to [remove] without delay." It was a treaty to induce the Indians, or as many of them as possible, to emigrate, not a treaty which would inevitably bring about a complete emigration. This being so, a grant of land in advance of emigration payment in advance for the performance of promises made by Indians, a race fickle and unstable to the last degree, would have been most unwise. The prospect of receiving a grant was held up to each tribe as the inducement to emigrate, but no grant was to be made until the promise was performed, and then only to such tribes as had performed their promises.

The proposed grants were not to be in fee simple in the ordinary acceptance of the term, as the grantees, the tribes, were to possess no power of alienation to outside parties. The original treaty had provided otherwise ("To have and to hold the same in fee simple forever, by patent," etc., Rec., 11), but the Senate struck out the sentence containing those words, and provided instead that the land should be held under patents issued in conformity with the act of May 28, 1830, section 3, containing an express provision for a reversion to the United States "if the Indians become extinct or abandon the same." As between themselves the Indians were to be allowed to sell and convey, subject to their tribal laws, but neither tribes nor individuals had that unrestricted power of sale which marks an estate in fee simple.

The appellants' brief contains the extraordinary statement, on page 32, that "it is conceded that the treaty of Buffalo Creek operated as a grant *in presenti* to the New York Indians of the Kansas lands." Neither the appellee nor the court below concede anything of the sort. The treaty operated to set apart certain lands for a certain length of time within which such Indians as wished were to be aided in removing thereto; after which removal, and not before, the tribes were to receive grants of so much of the land as they were entitled to by patent. As no such patents were issued (except as to the 10,240 acres not in dispute) the question whether the United States could, without action by Congress, take advantage of any reversion of the land so patented can not arise, and certainly no question as to the need of

Congressional action to enable the United States to assert its ownership of the unoccupied portion of the tract set apart by the treaty can arise, because that tract was never granted away by the United States, but the title always remained vested in the United States, who could, therefore, properly appropriate the land to its own uses upon a failure of the Indians to avail themselves of the provisions of the treaty and to remove.

It being clear that the treaty of Buffalo Creek did not *grant* the land to the Indians, it remains to consider precisely what rights the treaty gave them in regard to the land. These rights—rights to settle upon the land, to receive patents therefor, to be aided in the settlement and development thereof, and to be protected in the possession thereof—were dependent upon two conditions, viz, first, the acceptance of the country set apart for them and the agreement to remove thereto within a certain time, without which these rights could not be acquired; and second, actual removal in accordance with the agreement, without which these rights would be lost.

The first condition was expressed in article 3, as follows:

Such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States.

The character of the acceptance and agreement contemplated by this article is shown in articles 10, 13, and 14. It was an acceptance of the country set apart, and

an agreement to remove thereto within the time stated, expressed in the body of the treaty itself. This is certainly true as far as concerns the tribes whose chiefs, headmen, and warriors subscribed their names to the treaty. Had any other tribes afterwards given their assent to the treaty in writing, as provided in the last clause of the preamble, their acceptance and agreement could not have been expressed in the body of the treaty, but it would have had to be equally explicit and formal in its character, and could not have been inferred from a mere assent to the treaty itself. Assent to the treaty bound the assenting tribe or tribes to cede all right, title, and interest that they might have in the Green Bay tract, except the Oneida Reservation, and it entitled them to share in the benefits of the grant of the lands in the Indian Territory, but only *provided* they accepted those lands and agreed to remove thereto.

This fact renders it needless to discuss the propriety of the conclusion of law, announced in the opinion of the court below (Rec. 31-32), to the effect that *all* the tribes of New York Indians named in the treaty, whether residing in New York or not, and whether subscribing to the treaty or making any declaration of assent thereto or not, became parties thereto by declaring their assent to the treaty in its amended form, as required by the Senate resolution of June 11, 1838. The question is not what tribes were parties to the treaty; it is not what tribes assented to the amended treaty in the manner required by the Senate. It is what tribes *accepted the country* set apart for them and *agreed to remove* thereto. Whatever might be the

rights and obligations of the tribes who were parties to the treaty, only those who accepted the country and agreed to remove thereto had, as tribes, any part or lot in the promised reservation. Hence, for instance, it is immaterial whether the Onondagas at Onondaga or the Oneidas at Green Bay were parties to the treaty or not. The court below has decided, as a conclusion of law, that they were parties thereto, but it has not decided and it is not true that those separate and independent tribes of the original Onondaga and Oneida nations ever accepted any country set apart for them or ever agreed to remove thereto. Hence there can be no doubt that they come within the operation of article 3.

As has been already stated, the tribes which accepted the country and agreed to remove, as required by article 3, were the Senecas, the Cayugas, the Onondagas residing with the Senecas, the Oneidas in New York, and the Tuscaroras (articles 10, 13, 14), while, in the treaty as originally executed, the Oneidas at Green Bay and the St. Regis, though making no such acceptance or agreement, secured to such individual members of their tribes as should emigrate within the time allowed the rights of members of the accepting tribes. A separate treaty having been made with the Oneidas at Green Bay (7 Stats., 566) and proclaimed before the Senate passed on the Buffalo Creek treaty, this provision in favor of individuals of that tribe was struck out (Rec., 14-15), leaving the St. Regis the only tribe to whose individual members such rights were granted. The treaty of 1842, however, transferred the Senecas, and apparently also the Cayugas

and Onondagas residing with the Senecas, to the same category as the St. Regis.

The truth of the statement just made becomes manifest when the terms of the treaty of 1842 are studied in the light of the circumstances which then prevailed and are compared with those of the treaty of 1838. By the indenture annexed to the treaty of 1838 the Senecas had sold all their reservations to Ogden and Fellows (7 Stats., 557-559), thereby putting themselves in a position where they could ultimately be forced to emigrate if Ogden and Fellows took the proper legal steps to compel them to do so. It was the existence of this right of compulsion by Ogden and Fellows, and not any supposed right of compulsion on the part of the United States under the treaty itself, which induced the Senecas to protest against the ratification of the treaty, for, as has already been shown, the United States had no such right of compulsion, except as regards fulfillment of the contract with Ogden and Fellows. The right of Ogden and Fellows to call for a fulfillment of the contract was, however, indisputable, and it was for this reason that, as the court below has found—

After the amended treaty had been assented to the Senecas, the Cayugas and Onondagas residing with them, * * * continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made.
* * * The Indian protests against the treaty

were based upon the following allegations: (a) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the preemption owners; (b) that a considerable majority of the Indians wished to remain in New York. (Rec., 18, 19.)

The fruit of these protests was an important change in the contract, made by the treaty of May 20, 1842. (7 Stats., 586.) This treaty is far more than a mere approval by the United States of a private arrangement between the Senecas and the Ogden Land Company; it materially altered the contract as between the United States and the Senecas, and, apparently, also as between the United States and the Cayugas and Onondagas residing with the Senecas.

In the treaty of 1838 (art. 10) the Seneca Nation had solemnly agreed "to remove from the State of New York to their new homes within five years, and to continue to reside there," and the same article provided that the income from the proceeds of the sale of their New York lands should be paid to them "at their new homes." In the new agreement between the Senecas and Ogden and Fellows, incorporated into the treaty of 1842, however, the latter covenant and agree that the Seneca Nation (not a portion of it merely, but "*they, the said nation*"), notwithstanding the agreement of 1838, "shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation and the Allegany Reservation, with the same right and title in all things as they had and possessed

therein immediately before the date of the said indenture," i. e., the indenture of sale to Ogden and Fellows, incorporated into the treaty of 1838. The continuance of the Senecas "in the occupation and enjoyment" of the Allegany and Cattaraugus reservations (containing together 52,149 acres, and abundantly sufficient for the needs of the Senecas and those residing with them, if they lived as civilized communities) was manifestly incompatible with the fulfillment of their agreement to remove, made with the United States in the treaty of 1838. That agreement bound them *not* to continue to occupy or enjoy any reservations in New York whatever; it bound them *not* to do the very thing which the new indenture declared that they might and should do.

The execution of the new indenture was, therefore, a solemn declaration by the Seneca Nation that it would not fulfill its agreement to remove under the treaty of 1838, and when the United States by treaty consented to the several articles and stipulations contained in the new indenture, it declared its recognition of the fact that the Seneca Nation had abrogated its contract to remove contained in the tenth article of the treaty of 1838.

It is true that in *Fellows v. Blacksmith* (19 How., 366, 370), Nelson J., said *obiter*, that "their agreement to remove to their new home * * * remained unaffected by the second treaty," but in spite of this *dictum*, when the treaties are carefully compared, it is impossible to regard the indenture of 1842 as anything else than a formal and avowed abrogation by the Seneca Nation of its agreement to remove. For a valuable consideration

it reacquired its title to these two reservations, which title of itself involved the right to continue in the occupation and enjoyment of the whole of the reservations, even without an express covenant by Ogden and Fellows in regard to that right. The exercise of that right being the only possible object of the act of the nation in reacquiring the title, that act was a formal declaration that the Seneca Nation would exercise that right, and, therefore, as the agreement to remove was an agreement not to exercise that right of occupation and enjoyment, the act of the Seneca Nation was a formal abrogation of its agreement to remove. Had the title which the Senecas reacquired been in fee simple, so that the right of occupation and enjoyment would have been theirs whether they exercised it or not, even then the reacquisition of such a right would have been wholly inconsistent with an agreement not to occupy and enjoy. Their title, however, was not in fee simple (Rec. 22-23; and see *Strong v. Waterman*, 11 Paige (N. Y.), 607, 610), but depended for its very existence upon actual occupation and enjoyment, and hence *a fortiori* their act in reacquiring such a title was irreconcilable with the continuance of their agreement to remove.

Had the reservations reacquired by the Senecas been too small to contain the whole nation, it might have been possible to argue that the reacquisition did not have the effect above stated, but as 52,149 acres of fertile land would certainly support a population of 2,309 (or even 2,633, which would include the Onondagas and Cayugas), who did not live by hunting, like their forefathers, but

by farming, there is no room for such an argument. Again, had the land been held in severalty, the abrogation of the tribal contract might possibly have been held not complete, but proportionate to the population who would remain at Allegany and Cattaraugus; but as the land was tribal property, in which each member of the tribe had as good a right as another, there is nothing to break the force of the declaration that "the said nation" should continue in the occupation and enjoyment of the two reservations.

That both the Senecas and the United States understood the indenture of 1842 and the treaty affirming it as rescinding the Seneca contract in article 10 of the treaty of 1838 is clear from the second article of the new treaty, wherein the United States consented that any number of the Seneca Nation who should remove from New York under the provisions of the old treaty should be entitled to all its benefits in proportion to their numbers. No such provision was necessary in order to guard against the effect of a mere failure on the part of the Seneca tribe to keep its agreement to remove, an agreement necessarily involving the removal of the tribe, i. e., substantially all its members. The effect of a partial emigration was regulated by the proviso of the Senate resolution of June 11, 1838 (Rec., 17), that if any part of the Indians did not emigrate the quantity of land set apart for them and the money to be appropriated should be proportionately reduced. To have any meaning at all, the second article of the treaty of 1842 must have contemplated not a possible partial failure of compliance by

the Senecas with their agreement to emigrate, but an actual forfeiture by the tribe of all its interest in the lands set apart by the treaty of 1838.

The Senecas having in article 10 of that treaty accepted the country set apart for them and agreed to remove, they could not forfeit their interest in that country so long as their agreement remained in force. If, however, that agreement were rescinded, made as if it never had been, the forfeiture clause of article 3 of the treaty of 1838 would take effect *ipso facto*. While to most of the tribe this would have been a matter of indifference if not satisfaction, there were a few restless ones who wished to emigrate, and to provide for them the second article of the treaty of 1838 was adopted. Without a rescission and consequent forfeiture this article would have been not merely superfluous, but meaningless; understood with reference to a rescission and forfeiture, its meaning and utility become at once apparent.

By the operation of the indenture and treaty of 1842, the position of the Seneca Nation as to emigration under the treaty of 1838 was precisely that of the St. Regis tribe under its supplemental article. The nation as such did not agree to emigrate, nor had it any interest in the land originally set apart for it, nor any claim upon the United States for an appropriation for its removal and settlement, but such individuals of the nation as should actually emigrate under the provisions of the treaty of 1838 would be entitled to a share, in proportion to their numbers, both in the land and in the treaty. As to this point, the treaty of 1842 simply embodied the provision which the Senate, by its resolution of June 11, 1838

(*supra*), had attached, as an inseparable condition, to the treaty of 1838, viz, that the land should be given to actual emigrants only, and only in proportion to their numbers, allowing 320 acres for each emigrant, and that the money should be similarly applied. Had that provision not been substantially embodied in the new treaty, it might have been held to have been superseded thereby; but as it is there can be no such result.

The agreement of the Senecas to remove, contained in article 10 of the treaty of 1838, was made not merely on their own part, but also in behalf of the Cayugas and Onondagas residing with them. The article reads: "It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas residing among them," a certain tract, "to include one half section (320 acres) of land for each soul of the Senecas, Cayugas, and Onondagas residing among them * * * and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there." The agreement to remove, following as it does upon the agreement in regard to the particular tract set apart, which was unquestionably made in behalf of the Cayugas and Onondagas, must also be regarded as so made.

That it was so understood is shown by the fact that articles 11 and 12, which make special provision for the payment of money to the Cayugas and Onondagas "at their new homes," "on their removal West," contain no further agreement to remove, although such agreement was, by article 3, necessary to prevent a forfeiture of all interest in the lands set apart for them. As the carrying out of

the provisions of articles 11 and 12 was dependent on a removal, to which an agreement to remove was a necessary precedent, that agreement must have been regarded as made for the Cayugas and Onondagas by the Senecas, with whom they resided, the action of the latter being ratified by the two former tribes by their execution of the treaty. This being the case, and in view of the fact that by the treaty of 1838 the Cayugas and Onondagas were to continue to reside with the Senecas in the West just as they had done in New York, the rescission by the Senecas of their agreement to remove may properly be understood as rescinding the agreement of the two other tribes also, who, be it observed, had been a unit with the Senecas in their opposition to the treaty of 1838, both before and after its ratification. (Rec., 18.)

The second condition attached to the rights of the Indians in the country set apart by the treaty of 1838 was that of actual removal. This condition would have attached by necessary implication of law, even if the Senate had not imposed it in express terms. The covenants of the United States were promises in consideration of a promise, and the failure of the Indians to keep their promise was a failure of consideration, which, after that failure became manifest, relieved the United States from any further obligation in regard to its own covenants. In the case of the St. Regis tribe, and ultimately of the Senecas, and the Cayugas and Onondagas residing with them, there was, as has been already shown, no promise of removal, and hence no substantial consideration for the covenants of the United States, which covenants must be regarded as having given to these tribes a

mere option to share, in proportion to the numbers of their emigrants, in the privileges of the accepting tribes, which option was to expire with the time fixed for the emigration.

In point of fact, however, the Senate did not leave the respective rights of the United States and the Indians to any legal implication, but in its first resolution of ratification, June 11, 1838, provided as follows :

Provided further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of \$400,000, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as shall leave to each emigrant 320 acres only. (Rec., 17.)

As has been stated above, this proviso is conclusive against any theory that the treaty, as amended, contemplated a forcible removal of the Indians, and it is certainly no less conclusive as to the right of the United States, by Executive action merely, and without any action by Congress, to dispose of the surplus land and money in case the emigration was but partial.*

*The court below being convinced, and properly so, that the action of the United States in disposing of the surplus land and money was justified by the failure of the Indians to emigrate, irrespective of any express power of disposition reserved by the Senate, has not, as far as appears from the opinion delivered, based its decision of the case upon the Senate's proviso, and has, in fact, misconceived its application. The opinion reads :

The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty, with the Senate amendments, be submitted and explained to each of the tribes

Of the binding force of this proviso little need be said. Article 12 of the original (article 7 of the amended) treaty provided that the President and Senate must first pass upon the treaty before it should be binding. The Senate, in its resolution of June 11, 1838, declared the terms upon which it was willing that the United States should be bound. The Senate's resolution is as much a

or bands separately and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it, and the President should thereupon make a proportionate reduction from the \$100,000 fund and the quantity of land provided for west of the Mississippi. (Rec., p. 31.)

The error in this combination of two distinct provisos, intended as they were to meet two different contingencies, and the scope of their application being different, requires no lengthy demonstration. The opinion disregards the words "do not emigrate," and treats the second proviso as if it read "do not assent to the amended treaty." The provisos read as follows:

*Provided always, and be it further resolved (two-thirds of the Senate present concurring), That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only. (Rec., 16-17.)*

The first proviso affected the various bodies, the "tribes, nations, or bands," which composed the aggregation known as New York

part of the treaty as the original document executed by the tribes. Both together constitute the ultimate treaty, the contract between the parties. As a part of that resolution, the proviso stands on the same ground with the proviso requiring the free assent of the tribes in council, and with the amendments. It is in fact, as a statement of what the United States agreed to, as much a part of the

Indians. It affected them in their corporate, treaty-making capacity, and established the conditions upon which alone the treaty should be binding upon each one of them, the binding force being dependent in the case of each tribe, nation, or band upon its own separate corporate action, irrespective of what the other tribes, nations, or bands might do. This proviso had no reference to the action of individuals, nor to the ultimate fulfillment of any portion of the treaty, but only to tribal action in declaring assent to the treaty, and its binding force in consequence.

The second proviso concerned the action of individuals and their performance or nonperformance of what the tribes had undertaken should be done, or (as in the case of the St. Regis tribe, and subsequently the Senecas and others) had stipulated might be done. It ordered that if "any portion or part of said Indians," i. e., any individuals out of the whole body of New York Indians, without regard to tribal aggregations, should not emigrate, then only the portion or part that did emigrate, only the individuals who undertook to do what their tribes had agreed that they should do or had stipulated that they might do, these only should receive, each for himself an individual's share in the land, and should also share, in proportion to their numbers, in the benefits of the expenditure of the money that was to be appropriated, the unexpended balance, both of land and money, to be retained by the United States. This proviso had nothing whatever to do with the binding force of the treaty upon the several tribes, nations, or bands, as did the first proviso. It merely arranged what should take place under the various circumstances that might arise in the future, whether the treaty was assented to, in accordance with the first proviso, by all of the tribes or not.

treaty as if it had been incorporated into the text by amendment, or even formed one of the original articles. The only difference between it and a provision of the original treaty is that as the proviso was in substance an amendment of the treaty, it had to be made known to the tribes and assented to by them before they would be bound by it. That it was so made known and assented to is clear. The resolution containing the proviso was ordered to be laid before the President, and in August and September the commissioner convened councils of the tribes. Each tribe declared separately its "free and voluntary assent to the foregoing treaty *as amended by the resolution of the Senate of the United States on the 11th day of June, 1838*, * * * the same having been submitted to us * * * and fully and fairly explained * * * to our said tribe in council assembled." By the same solemn declaration of assent to the treaty, upon which declaration each tribe that was really a party to the treaty bases its present claim, each assenting tribe declared that the whole effect of *the resolution of the Senate* in amending the treaty had been fully and fairly explained to such tribe, and that its assent was given on that basis.

But for the circumstance that the protests of the Senecas against the validity of the assent of their tribe to the treaty induced the President twice to send back the amended treaty to the Senate, that body would have taken no further action in the matter. Such action being, however, required, the Senate, both on March 2, 1839 (Rec., p. 17), and on March 25, 1840 (Rec., p. 18), adopted resolutions referring to its resolution of June 11,

1838, and thereby reaffirming it. On March 2, 1839, they resolved that the treaty should be proclaimed when the President was satisfied that the treaty had been assented to in accordance with the resolution of June 11, 1838, while on March 25, 1840, they resolved that it had been so assented to. On both these occasions the Senate upheld the resolution of June 11, 1838, and on neither did they revoke or rescind any portion of it. Finally the proclamation of the treaty, April 4, 1840 (Rec., 18), itself declared that the President's action was taken "in pursuance of the resolutions of the Senate of the 11th of June, 1838, and 25th day of March, 1840," thereby calling attention to those resolutions, the first as well as the second, as the warrant for his action. By the terms of the treaty itself its validity was to depend upon the action both of the Senate and of the President. The Senate, by its resolution, declared what should be the provisions of the treaty, and what the terms upon which it should be binding upon the parties. These provisions and terms were communicated by the Senate to the President, as his proclamation shows; but had this by any chance been otherwise, and had the President proclaimed the treaty with any other provisions or upon any other terms than those adopted by the Senate, or with the omission of any of these provisions or terms, then the treaty proclaimed would have been something else than that assented to by the Senate, and therefore invalid.

In *Doe v. Braden* (16 How., 635), where the King of Spain had, in his ratification of the treaty for the cession

of Florida, added a declaration that certain grants should be held to have been annulled, the Supreme Court said :

It is too plain for argument that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or *adding a new and distinct stipulation*, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and *as binding and obligatory as if it were inserted in the body of the instrument*.

In the present case, the only difference was that the proviso being contained in the Senate's resolution of advice and consent was not corporeally annexed to the treaty, it not being the practice to annex such resolutions; but the resolution being made known to the tribes, the proviso became as much a part of the treaty as if it had been annexed to or incorporated in it. The assent of each of the tribes, therefore, operating as it did as a renewal of the former acceptance of the country and agreement to remove, was an acquiescence in all the limitations imposed by the Senate upon the rights acquired by the respective tribes in the country accepted.

The proviso itself was clear and explicit. The words "do not emigrate" are not, indeed, expressly limited either as to time or place, but being used of an emigration under the treaty of 1838 they can only refer to such an emigration as was provided for by that treaty, and such as all but one of the tribes who were parties to it had agreed to make (though some of them were subsequently

released from the agreement), viz, an emigration to the country set apart in the West, within five years from the proclamation of the treaty, subject to the right of the President to extend the time if he saw fit. A "proper proportion" of the \$400,000 was evidently such a part as would give the emigrating Indians substantially the same benefits as they would have had if all had emigrated. The whole proviso was so drawn as to be capable of being carried out without difficulty by Executive action, and it was carried out.

3. The course pursued by both parties.

As to this point it is submitted—

EXCEPT IN SO FAR AS THE FAILURE OF THE INDIANS TO EMIGRATE HAS RELEASED THE UNITED STATES FROM THE OBLIGATIONS IMPOSED BY ITS COVENANTS CONTAINED IN THE BUFFALO CREEK TREATY OF 1838, THE SAID COVENANTS HAVE ALL BEEN FULLY PERFORMED—BOTH THOSE WHOSE PERFORMANCE WAS NOT DEPENDENT ON THE EMIGRATION OF THE INDIANS AND THOSE WHICH RELATED TO THEIR EMIGRATION AND PERMANENT SETTLEMENT.

The covenants which were independent of the emigration of the Indians were those for the payment of \$5,000 to the St. Regis tribe and \$6,000 to the First Christian and Orchard parties of the Oneidas in New York, and in regard to the money to be paid the Senecas by Ogden and Fellows. (Arts. 9, 10, 13.) Finding XVIII (Rec., 21) shows that these covenants have all been fulfilled; but the character of the present claim is well illustrated

by the fact that the petition included a demand for the \$5,000 as due the St. Regis and the \$6,000 as due the Oneidas, as well as \$1,625 alleged to be due certain chiefs, although the vouchers showing payment in full were in the Treasury, the facts of such payment having been either concealed or forgotten by the Indians, and, in consequence, wholly unknown to their counsel.

The fulfillment of the covenants relating to emigration and settlement is shown by the findings and certain statutes to have been as follows: The tribes whose reservations had been sold to Ogden and Fellows (viz, the Senecas, the Cayugas and Onondagas residing with them, and the Tuscaroras) continued, after the treaty of Buffalo Creek had been ratified, to protest against its being carried into effect, requesting that no appropriation be made for that purpose, and declaring that they would never emigrate but on compulsion. The Senecas in particular asserted that their declaration of assent to the amended treaty was invalid. These protests continued until the Seneca treaty of May 20, 1842, was made, and on the part of the Tuscaroras even later, the chiefs of this tribe declaring that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. After the treaty of 1842 the Indians of the Buffalo Creek Reservation settled on the Cattaraugus and Allegany reservations. Some of the Indians did apply to the Government for the proper steps to be taken for their emigration. (Rec., 18, 19.) It does not appear at what time such application was made, but it was, most probably, not till after the treaty of 1842, as

until the making of that treaty the opposition to removal was intensely strong on the part of the Senecas, and the Cayugas and Onondagas residing with them, because all the Seneca reservations having been sold to Ogden and Fellows by the indenture of 1838, a complete emigration of these three tribes was required, and no merely partial emigration would have been possible. It was only by opposing *all* emigration that the nonemigrationists (whom the issue proves to have been greatly in the majority, in spite of the fact that chiefs had been found to execute the treaty) could hope to secure some measure of relief. After the treaty of 1842 had granted that relief, but not before, the emigration party was naturally left free to apply for the promised aid in removing.

It does not appear precisely how many Indians applied to have the proper steps taken for their emigration, but there could not have been many such, for "it was not deemed expedient to enter into any arrangements for this purpose until the Department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove" (Rec., 19), and the agent was not appointed till 1845. As the *Act of March 3, 1845* (5 Stats., 612), appropriating \$20,477.50 to carry out the provisions of the treaty in regard to 250 Indians, made that sum available, "provided that so many are willing to emigrate," it may fairly be inferred that 250 constituted the "sufficient number to justify the expenditure incident to the appointment of an agent," and that such number did not manifest their intention to remove until 1845.

In point of fact, the ultimate emigration was of less than the "sufficient number," for though Hogeboom, the agent, mustered 271 Indians for emigration, only 198 started with him, and of these only 191 stayed with him till the end of the journey, while 17 other Indians arrived subsequently, making a total emigration of 208. Of this number 82 died, 94 returned to New York, and 32 remained on the land and received allotments in 1860. (Rec., 19, 21.)

The cost of the emigration was \$6,834.79, viz, \$1,034.50 for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling, and \$5,800.29 for transportation, supplies on the journey, and the pay of the emigration agent. After the emigration party reached its destination, \$2,962.32 were expended for supplies, etc., for them, including \$350 for medical attendance and supplies. (Rec., 21.)

The President never appointed any other time for emigration than the five years fixed by the treaty, but the Hogeboom party was allowed to emigrate shortly after the five years had expired. In June, 1846, while that party was on its way, the Senecas, and the Cayugas and Onondagas residing with them, met in council at Cattaraugus. The Tuscaroras had been summoned, but did not attend. The chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained, and the commissioner for the United States held an enrollment, but could find only seven Indians with a report of five others, who wished to emigrate. (Rec., p. 19.) As already stated, 17 Indians emigrated after the

Hogeboom party went, presumably after this council was held. The findings disclose no subsequent request for permission to emigrate.

The findings do not indicate any neglect of the Government to fulfill its treaty obligations to those few Indians who availed themselves of the provisions of the treaty and actually emigrated. The failure of the emigration may be sufficiently accounted for without assuming that the Government was in default. The settlement of a new and uninhabited region by those who come from a distance involves, under the most favorable circumstances, many privations, much suffering, and usually not a few deaths. Resolute energy and great adaptability to circumstances are indispensable to successful colonization; but they are qualities in which Indians are conspicuously lacking, while these particular emigrants were presumably the least competent members of their tribes—the rolling stones, who had failed to win a livelihood on the fertile reservations in New York. That many of them sickened and died and many others lost heart and returned is not at all to be wondered at, while the fact that 32 remained on the land for years afterwards shows what all might have done had they possessed the same capacity and physical powers of endurance.

The emigrants who returned necessarily lost, by such return, whatever rights they might have had by virtue of their emigration. The rights of the 32 who remained on the land and received their allotments in 1860 were adequately provided for by the act of February 19, 1873 (17 Stats., 466), and in point of fact the petition in this

case makes claim for the value of 1,605,760 acres specifically (Rec., p. 5), which quantity is reached by deducting from the 1,824,000 acres mentioned in the treaty the 10,240 acres allotted to the 32 permanent emigrants, as well as the 208,000 for which compensation was made to the Tonawandas in 1857. As to the share of the 32 permanent emigrants in the \$400,000, the United States having paid for their transportation and supplies on the way, and for supplies to them during the first year of their stay, and they having been able to remain on the land for at least fourteen years after they came there, the United States must be presumed to have done for them all that was necessary, and at all events the record discloses nothing to the contrary.

Moreover, the treaty can not properly be understood as imposing upon the United States any obligations whatever to any such insignificant portion of the Indians with whom the treaty was made as these 32 individuals. The treaty was made with whole tribes, and the covenants of the United States were made to those tribes, and not to individuals, and they were made in contemplation of an emigration of whole tribes, or at all events of a substantial portion of the population of those tribes. The tribes and bands who appear of record as having assented to the amended treaty (*viz*, the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis) numbered in 1837 3,826 persons, and an emigration of 32, or even of 208 (the number that actually reached the land), can not be regarded as such a compliance with the original agreement to emigrate as to impose any obligation upon the

United States under its covenants. That it did voluntarily aid these people "in removing to their homes, and supporting themselves the first year after their arrival," and that it gave 320 acres apiece to the 32 who remained, is no reason for unduly extending the obligations of its covenants. The promise to appropriate money "to encourage and assist them in education, and in being taught to cultivate their lands, in erecting mills and other necessary houses, in purchasing domestic animals and farming utensils, and acquiring a knowledge of the mechanic arts" necessarily contemplated a community of substantial size as the recipient of such aid, and not a mere handful of 32 individuals. All claim on account of the Indians who emigrated may therefore be set aside, and the case of those who remained in New York need alone be considered.

4. The rights of both parties in consequence of the course pursued.

The conclusions reached by the court below in this matter are contained in the following paragraphs:

It can not be doubted that if the plaintiffs in this action really wished to avail themselves of the treaty grants the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. But the Government was not prepared to resort to harsh measures, or, against his will, to drive the Indian from his home, so it made a bargain with him in 1838, and that bargain it fulfilled in moving the Hogeboom party, for in doing this it moved all the

Indians who then or since (so far as is shown) have ever wished to leave New York for the Kansas lands.

* * * * *

We have no reason to doubt that the United States took to Kansas all the Indians who wished to go there, and thus substantially fulfilled their share of the contract. Some Indians went to Wisconsin, as they had a right to do, and there received land as was promised. The mass of the Indians remained in New York, as they preferred to do and as they had a right to do, and sold their lands or now remain upon them.

* * * * *

Upon the whole case it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek, but as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfillment and preferred the then existing situation—no damage to either side can be said to have been inflicted. (Rec., pp. 41, 42.)

These conclusions are amply warranted by the findings, especially when it is remembered that the Senate resolution of June 11, 1838 (one of the two resolutions upon which the treaty depended for its validity), had expressly provided that only actual emigrants should receive either land or financial aid, and that the United States should keep whatever balance of either might be left.

(Rec., p. 17.) The findings do not indicate that any substantial number of the Indians ever applied to be removed, but they do show most clearly, as does also the treaty of 1842, that the great majority of the Indians never had wished to emigrate.

The findings state that "many of the Indians have protested against any removal," that only 271 were mustered for emigration with Hogeboom, of whom only 198 started with him, and that the commissioner who attended the council held just after Hogeboom's start, and who held an enrollment for two full days, could only learn of 12 others who wished to go, who presumably were among the 17 who afterwards joined Hogeboom's party. The only conclusion that can possibly be drawn from such a state of facts is that the Indians themselves are responsible for their failure to emigrate and for the consequences of that failure.

In opposition to this conclusion it was contended in the court below :

First. That it was the duty of the United States to remove the Indians, which it has neglected to do.

Second. That it was the President's duty to fix a time for the removal of the Indians, which he has neglected to do.

Third. That the Senate proviso, directing what should be done in case any part of the Indians did emigrate, was void.

Fourth. That the Tonawanda treaty of 1857 recognized a right in the Tonawanda Senecas to the land in Kansas, and a right to be removed there, even at that date,

and that all the parties to the treaty of 1838 have the same rights.

Fifth. That the alleged right of the New York Indians to the possession of the land set apart by the treaty of Buffalo Creek of 1838 was recognized in certain acts of Congress passed in 1854, 1859, and 1861 as a right existing at the respective dates of the said acts.

As to the first contention, it has been already made sufficiently clear in the first part of this brief that after the execution of the treaty of 1842 the United States had no right to remove any of the Indians to the West against their will; but even if this right could possibly be held to have existed, its existence would not have involved a duty to compel the Indians to go. As the court below has said, "Perhaps the President had the power and technical right, * * * but it was not a power he must use, and it was not a power which the Indians wished him to use." (Rec., p. 41.) The only question, then, is whether the United States has performed its duty of removing to the West those Indians who wished to go.

It was urged in the court below, as an evidence of the failure to perform this duty, that but a little more than a twentieth part of the promised \$400,000 had ever been appropriated, but this argument overlooks the fact that the \$400,000 was to be applied to many other items besides removal, and also that there was no agreement to appropriate the \$400,000 all at once, but merely to appropriate that amount in the aggregate, or a less amount, according as the emigration should be complete or not. Had every Indian whose tribe is named in Schedule A

been removed, the expense would probably not have exceeded \$150,000. The 208 who went to the West represented a cost to the Government before and during their journey, of \$6,834.79, including the agent's pay. This comes to less than \$33 apiece; and had the number been greater the proportionate expense would probably have been less. As far as the cost of transportation and supplies on the way were concerned, an appropriation of \$20,477.50 would have sufficed for at least 600 people. After March 3, 1843, therefore, the Government may be held to have stood ready to remove at least 600 people, and had more than that number applied a further appropriation would certainly have been forthcoming. As the findings show that the Indians who went West were not all who were given an opportunity of going, but that they were practically all who wished to go, it is idle to talk of a failure on the part of the United States to provide sufficient money for the removal of others, who are proved to have had no desire to go.

As to the second contention, it has also been made sufficiently clear already that the treaty fixed a limit of five years, counting from the day of its proclamation, of course, for the time within which the emigration should take place, giving to the President, however, the right, in his discretion, to extend the time, but not requiring him to do so. He did not make any specific extension of the time, but, as was certainly within his power, he allowed the Hogeboom party to remove in 1846, more than a year after the expiration of the five years. Had any other party wished to remove within a reasonable time thereafter it would presumably have had an extension of the

time made in its favor, but as it had become evident by June, 1846, that no further emigration would take place, the President was not called upon to take any further action in the matter.

Granting, for the sake of the argument, that the intention of the treaty was to require the President to appoint a time for removal, was he required to do so in 1859, before the United States could resume control of the lands? Clearly not. The only object in appointing a time was to notify those Indians who wished to emigrate, so that they could do so in time. The Indians (except the small party who went with Hogeboom), both by word and deed within the five years originally named, as well as shortly after the expiration of that period and the departure of the Hogeboom party, and by their consistent course of action in the fourteen years subsequent thereto, had announced their fixed determination not to occupy the lands. Their open declarations against emigration may fairly be taken as a waiver of the right (if such existed) to have the original five years extended, and at all events their whole course up to 1859 made it clear that if the President had in 1859 appointed a final time for their removal it would have been an empty form. The case comes therefore within the rule that when it is reasonably certain that an act necessary to the establishment of a right will be nugatory on account of the determination of the other party not to regard it, its performance will be considered as waived. (*Hills v. Exchange Bank*, 105 U. S., 319; *United States v. Lee*, 106, *id.*, 196, 202.)

The third contention, as to the Senate proviso, is one which it is hard to treat seriously. The force of the

proviso, as a declaration of the terms upon which the United States consented to be bound by the treaty, has been considered above. The appellants can not contend that this proviso was not a part of the Senate's resolution, nor that it was not communicated to the tribes, nor that the Senate ever revoked it, nor that the President's proclamation, reciting that he acted by authority of that resolution, did not give notice to all the world of the existence of that resolution, and of the proviso as a part thereof. The only flaw that they can find in it is that the editor of the seventh volume of the Statutes at Large neglected to publish the proviso along with the treaty; but as this volume was not published till 1853, fifteen years after the Indians had been informed of the proviso, and seven years after they had finally decided not to emigrate, this neglect could not have harmed them seriously.

Granting, however, for the sake of the argument, that the proviso should, for some reason not now apparent, be disregarded, the right of the United States to retain the unoccupied land and the unexpended money would still be unassailable. The United States had promised the Indians to set apart certain land, to expend \$400,000 in connection with their removal to and permanent settlement upon the said land, and ultimately to grant them the land itself, in consideration of the promise of the Indians to remove to the said land. The United States removed to that land in 1846 all of the Indians who wished to go there, and paid the cost of such removal and of the maintenance of these Indians upon the land for a certain length of time. All

the other Indians declared either in express terms or by an equally significant course of inaction that they had no intention of fulfilling their promise. Some of them never had promised to remove, but had merely obtained a right to do so within a limited time. Under the circumstances, the consideration for the promises of the United States having failed, and the performance of those promises having ceased to be desired by the promisees, the United States was relieved of all further obligation in regard to either the land or the money, except as to those Indians who had removed to the land promised and had remained thereon, and hence the United States had a right to dispose of the unoccupied land and the unexpended balance of the money as it might see fit.

As to the fourth contention, the peculiar position of the Tonawanda band has been already referred to in discussing the case of *Fellars v. Blacksmith* (19 How., 366). They were a band of the Senecas, living on a reservation which had been sold with the Government's approval, but which they had refused to surrender. The courts having no jurisdiction over the contract of sale, it was the Government's duty to see that it was carried out. This duty had been neglected, apparently out of consideration for the Indians, and in 1857 the latter were still on the land. Whether all the spare land on the Cattaraugus and Allegany reservations, to which the Tonawandas might have retired in 1842, was occupied or not does not appear, but as Kansas was rapidly filling up, and was, moreover, in a very disturbed condition between the free-soil and slavery parties, emigration thither offered

no advantages, and as it was evident that the Indians were greatly attached to their old homes.

Had the United States simply required the Ogden Land Company to abandon its rights under the contract with the Indians, it would have been guilty of a breach of faith to the company, while unless it was prepared to do so the Indians had to be taken care of in some way. Accordingly the United States, with extreme generosity, gave the Indians money enough to buy from the Ogden Land Company the fee-simple title to nearly two-thirds of the reservation (all that the Indians wished to retain), and also to provide an increased tribal annuity. (Rec., p. 21.) In this way both the Indians and the Ogden Company were satisfied. That the sum fixed on, \$256,000, represented the value of the land originally set apart for these Indians under the treaty of Buffalo Creek, and their proportionate share of the fund of \$400,000, originally provided, and that it was given them in consideration of a release of all claims that they might have had under that treaty, were mere matters of detail. The main point was that the United States felt itself bound in honor to do something for these Indians, and it is immaterial how it chose to estimate the money value of the obligation. No other Indians were in the same position as the Tonawandas, and what the United States did for them was no recognition of any obligation to Indians differently situated. In fact, as is stated in the opinion of the court below, that the Government paid the Tonawandas, but not the other Indians, is in itself a recognition that the latter did *not* stand on the same ground as the Tonawandas. (Rec., pp. 37-8, 39.)

The fifth contention has as little foundation as the others. The "*Kansas-Nebraska*" Act of May 30, 1854, section 19 (10 Stats., 284), reads as follows:

Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Kansas, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

This proviso first guarantees the rights of person or property of all the Indians then (in 1854) in the Territory of Kansas. This guaranty affected but about 32 New York Indians, as there were only that number then in the Territory, and as allotments were subsequently made to them it can hardly be claimed that the guaranty has been violated.

Next, this proviso excluded from the limits of the Territory lands which, under Indian treaties, were not to be included in any State or Territory until the tribes affected assented to being included. The treaty of Buffalo Creek

provided that "the lands secured to them *by patent* under this treaty"—the lands, that is to say, that should thereafter be taken up by the Indians and which should be granted to them by patent—should never be included in any State or Territory. This restriction of the privilege of noninclusion to the lands actually settled and patented is entirely in accord with article 3, which restricted all interest in the lands to those tribes that accepted them and agreed to remove thereto, and with the all-controlling proviso in the resolution of June 11, 1838, which required, in case the emigration were not completed, the deduction of all but 320 acres for each actual emigrant.

In 1854 no patents had issued to any of the New York Indians for the land they had settled on in the West, and hence, strictly speaking, the privilege of noninclusion did not extend to any of their land, so that the act of Congress did not apply to it at all. Possibly the right of the 32 to receive patents for their lands may be held to bring them within the operation of the act of Congress, but certainly they are the only individuals whose rights it can by any possibility be held to recognize.

Lastly, the proviso affects the authority of the United States over the Indians and their lands, but as far as concerns the New York Indians, this, like the other parts of the proviso, can at most refer to the 32 settled Indians only. It is clear that no part of the proviso recognizes any rights as existing in any of the Indians in New York, and it is to be observed that the proviso could not have been inserted for their benefit, as it is a general provision

applying to all the numerous Indian tribes in the proposed Territory, as well as in that of Nebraska, the identical language being found in section 1, which applies to Nebraska, both Nebraska and Kansas having been carved out of the Indian Territory.

The *Act of March 3, 1859*, section 11 (11 Stats., 431), is most naturally understood as referring to the New York Indians then in *Kansas*, and as providing that patents, with guards and restrictions to be prescribed by the Secretary of the Interior, should not be issued to them, presumably because the character of the patents to which they were entitled was fixed by the treaty, so that no further guards and restrictions were needed. Even if, by a strained construction, this proviso be held to refer to the New York Indians in *New York*, it could at most only manifest an unfortunate ignorance on the part of Congress, and does not go far enough to give to those Indians rights which they had ceased to possess.

The *Act of January 29, 1861*, section 1 (12 Stats., 137), recognizing the rights of Indians to lands in *Kansas*, and excepting such lands from the limits of the State, has no possible bearing on the case. It makes no reference to the New York Indians, while the lands once held for them, but of which they had lost their rights after 1845, had been made public lands by the President's proclamations of December 3 and 17, 1860.

The concluding words in the opinion of the court below, viz, that "the claimants herein have been treated with kindness and consideration, and have in no way been injured in their rights and privileges," involve no mere

figure of speech. The course pursued by the United States is precisely that which the Indians, one and all, requested it to pursue. It approved the reacquisition by the Senecas of the Cattaraugus and Allegany reservations, thereby releasing them from their agreement to remove; it aided the emigration of those who wished to emigrate, and it left in peace those who wished to stay. It performed to the full the measure of its duty, as stated by this court in *United States v. Kagama* (118 U. S., 375, 383), and *Choctaw Nation v. United States* (119 *id.*, 1, 27-28). Having so done, the United States was entitled to dispose of the surplus land and money, neither of which had ever been the subject of a grant to the Indians, but only of the promise of grants in the future provided the Indians qualified themselves to receive them.

The appellants have seen fit, on pages 32-36 of their brief, to discuss the respective rights of the different claimants in the event of a reversal of the judgment against them. It is submitted that such a discussion is wholly premature, but should the court for any reason desire to go into it, then it is submitted that some of the claimants have no rights whatever under the treaty of Buffalo Creek, because they never accepted the country set apart for them, nor agreed to remove thereto, as required by article 3. These were the Onondagas at Onondaga, the St. Regis, the Oneidas at Green Bay, the Stockbridges, Munsees, and Brothertowns. With the exception of the St. Regis these tribes were not even parties to the treaty of Buffalo Creek, for though the Green Bay Oneidas signed the original treaty, they did

not assent to it as amended. On the strength of the Senate resolution of March 25, 1840, "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians * * * have been satisfactorily acceded to and approved by said tribes," the court below has found that *all* the tribes named in the body of the treaty as possible beneficiaries were actual parties, but the most that that resolution can possibly mean is that *those tribes with whom the treaty was originally made* had satisfactorily acceded to it as amended. The treaty never having been made with the Onondagas at Onondaga, the Stockbridges, Munsees, and Brothertowns, the resolution manifestly did not apply to them, and in point of fact it should not be understood as meaning more than that all the assents were satisfactory. So understood, it also excludes the Oneidas at Green Bay, who never were called upon to assent to the amended treaty, because another treaty was made with them.

Of the tribes who did accept the country and agree to remove, the Tuscaroras can have no rights, because they subsequently declared officially, by their chiefs (Rec., p. 18), that they would not remove, thereby releasing the United States from all obligation to see to their removal.

The effect of the treaty of 1842, as rescinding the agreement to remove on the part of the Senecas, and the Cayugas and Onondagas residing with them, has been already considered. As all that was left to the Indians of these tribes was an *individual* right on the part of such as chose to emigrate to participate in the benefits of the treaty in proportion to their numbers, it is hard to see

what rights the tribes could have collectively to recovery for a violation of individual rights. Certainly the tribes could not recover without some proof that a reasonably definite number of Indians wished to emigrate and were prevented by the inaction of the United States, and the recovery could only be proportionate to that number, because the reacquisition of the Cattaraugus and Allegany reservations is proof positive that a large portion of these tribes would not have emigrated, whatever the United States had done.

As for the New York Oneidas, the findings show that most of them voluntarily went to Wisconsin, evidently because they preferred to be with their brethren there rather than go off by themselves to the Indian Territory. In no event could there be any recovery for interests which they thus voluntarily abandoned.

Hence, even if it were possible for the court to hold that the United States had failed to perform any of its treaty covenants, the evidence would still show that such failure could not have affected all the claimants, but only some small, unascertained number of individuals in a few tribes.

It is therefore submitted that the judgment should be affirmed.

CHARLES C. BINNEY,

Assistant Attorney,

HOLMES CONRAD,

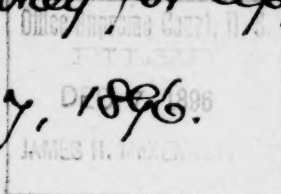
Solicitor-General,

For Appeller.

No. 415. 106.

Sup^r. Dy. of Binney for Appell

Filed Dec. 7, 1896.

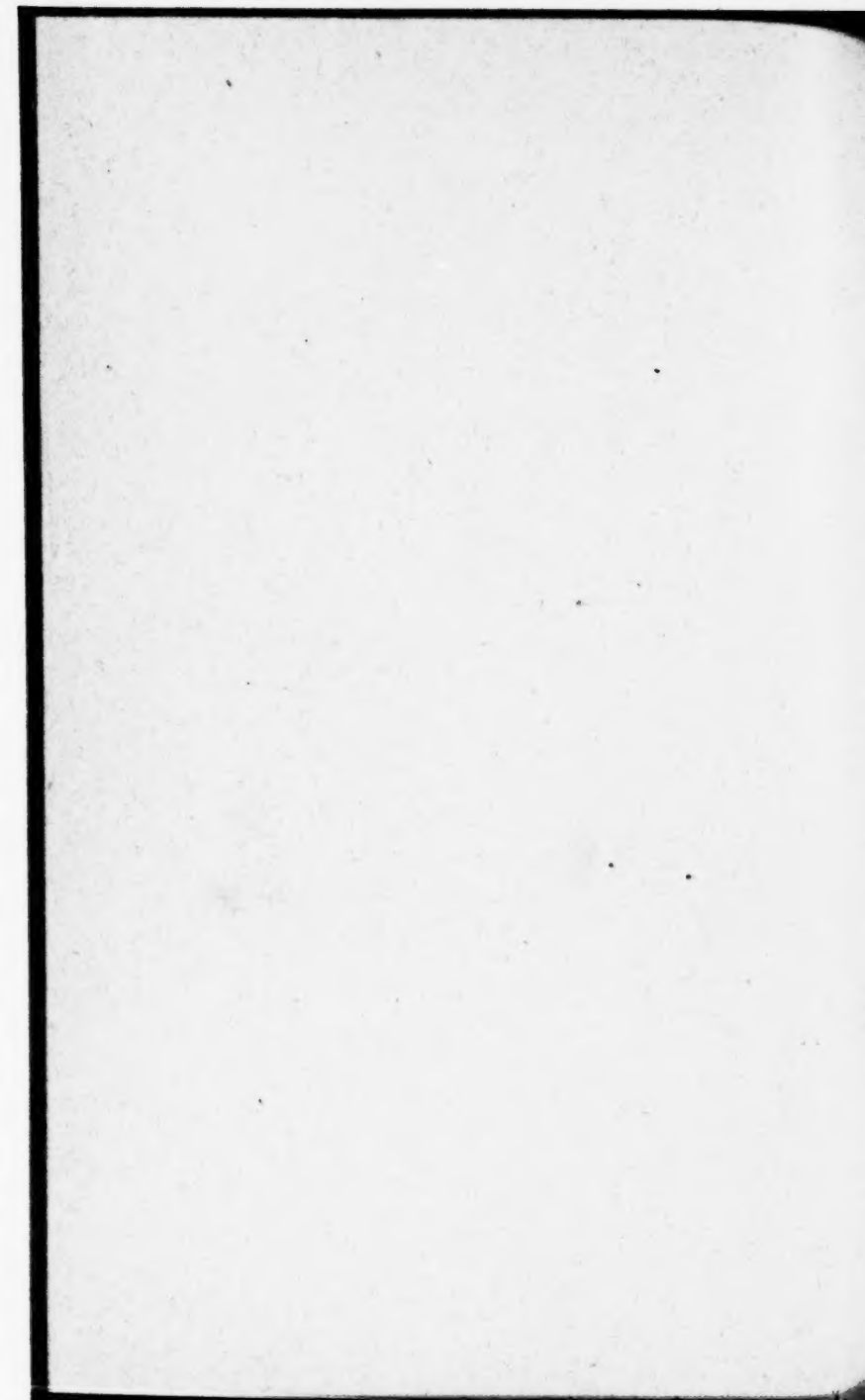


In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE NEW YORK INDIANS, APPELLANTS, }
v. } No. 415.
THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR APPELLEE.



In the Supreme Court of the United States,

OCTOBER TERM, 1896.

| | |
|-----------------------------------|------------|
| THE NEW YORK INDIANS, APPELLANTS, | } No. 415. |
| <i>v.</i> | |
| THE UNITED STATES. | |

SUPPLEMENTAL BRIEF FOR APPELLEE.

In the Additional Brief for the Appellants, filed November 28, 1896, certain statements are made which call for notice by appellee's counsel.

(1.)

The Additional Brief asserts that the defense made by the United States, which has been sustained by the Court of Claims, is not warranted by the pleadings. The brief states that—

The issues of fact presented by the pleadings are made by the petition and the pleas of the United States. These issues are limited by the pleadings to the truth of the allegations set forth in the petition, for the United interposed a general denial only, and did not plead any special matter in controversy or avoidance of the claims set up in the petition. * * *

It is clear that the United States must be confined to the issues made by the pleadings and can not be heard to allege that some one or all of the several tribes of Indians either abandoned the treaty or had accepted a sum of money in relinquishment of any claim growing thereout. * * *

To avoid what would seem the inevitable liability of the United States in the premises, the court below holds that the claimants in effect abandoned the treaty and consented to forego all claim upon the United States resting thereon. As is above pointed out, the Government is in no position under the pleadings to set up such a defense. (Additional Brief, pp. 3, 4, 16.)

Whether or not, had this suit been brought in another court than the Court of Claims, the appellants could have contended that the defense set up by the United States could not be made, on appeal, under the general issue, it is certain that no such contention can be supported on an appeal from a judgment of the Court of Claims, as it is well established that while the proofs adduced in support of the petition must not wholly depart from the case presented therein (*Baird v. United States*, 8 C. Cls. R., 13), yet neither the common law rules of pleading nor those incident to proceedings in equity are in force in that court. (*Peirce v. United States*, 1 C. Cls. R., 195; *Brown v. District of Columbia*, 17 *id.*, 303, 310.)

In *Burns v. United States* (4 *id.*, 113, 127), the opinion of the court said plainly, "*we have no rules of pleading*," and when the judgment in that case was affirmed on appeal this court took no exception to the statement just quoted, and itself said: "The Court of Claims in deciding upon the rights of claimants is not bound by any

special rules of pleading. (*United States v. Burns*, 12 Wall., 246, 254.)

Again, in *Figh v. United States* (8 C. Cls. R., 319, 322), the Court of Claims said:

Constituted as this court is, the rules of technical pleading which might be applied here need not be discussed. It is enough that they have not been relied on by the parties, and if they had, under the repeated rulings of the Supreme Court, it would be our duty to decide the case on the merits, without regard to technical rules.

In *Burke v. United States* (13 C. Cls. R., 231, 238), it was said:

The forms prescribed for [the Court of Claims] are neither taken from the common law nor from equity. They leave a large measure of freedom from the restraints of special rules of pleading. (*Burns's Case*, 12 Wall., 246.)

Under such rulings as the above, special pleas of any sort are, as this court is well aware, very rarely made in the Court of Claims, and only in very exceptional cases, the established custom being that the general traverse covers substantially every defense except counter claim where a judgment is sought to be recovered against the claimant, and *nul tiel corporation*, a counter claim that does not exceed the claimant's demand requiring, apparently, no special plea. (*Wisconsin Central R. R. v. United States*, recently decided.)

The reason for this disregard of technicality is readily seen when the practice in the Court of Claims is observed. Each side being required, before a case can be put on the calendar, to file a request for findings, with a reference to

the precise evidence upon which each desired finding is based, together with a brief stating the points of law relied upon, it is impossible that either side should be left in ignorance as to precisely what constitutes the claim or defense of the other side, as the case may be.

The general issue in each case being, therefore, the question of the liability of the United States on account of the matters stated in the petition, the defendant's brief and requests take the place of special pleas, and the question for an appellate court to determine is whether the court below has correctly applied the law to the findings as made, not whether those findings have been previously set out in any formal pleading. The rules of pleading were required in order to enable issues to be made and to prevent surprise. Where, as in the Court of Claims, these ends are attained by other means, the rules of pleading are not needed. *Cessante ratione legis, cessat ipsa lex.*

Even if the general traverse did not have the broad scope that is given to it in the Court of Claims, the objection now made by the appellants would come too late. The facts of the case being presented in the findings as fully as they could possibly be in any pleadings, and no objection to the sufficiency of the pleadings to sustain the findings requested by defendant appearing by the record to have been made in the court below, the judgment of the Court of Claims upon those findings would necessarily have cured any defect or insufficiency in the pleadings. As this court said in *Adam v. Norris* (103 U. S., 591, 595):

This objection [that the issue raised by the pleadings did not cover that upon which the case was

decided] was not made in the case before the circuit court. The case was submitted to the court, which found all the facts necessary to decide the question of title to the land held by defendants. We think it is too late to raise this technical question after a full hearing and finding by the court of all the facts pertinent to the case. The pleading would be good after verdict. *A mullo fortiori*, is it good after this finding, and on appeal, with no attempt to correct it in the court below.

In *Wisconsin Central R. R. v. United States* this court recently affirmed the judgment of the Court of Claims in spite of an objection on the ground of insufficient pleadings, not merely because "the record does not disclose that this objection was raised below," but chiefly because "the findings of fact show that the entire matter was before the court for, and received, adjudication." That is precisely the condition in the present case.

(2.)

In seeking to magnify the cession of the Indians' right, title, and interest in the lands at Green Bay into a substantial consideration for the covenants of the United States in the treaty of Buffalo Creek, the Additional Brief says:

The Court of Claims did not find nor is it true that the United States made a grant of lands in Wisconsin to the New York Indians at any time. The Wisconsin lands were purchased and paid for by the claimants. * * *

Nothing could be further from the truth than the statement in the opinion of the court below that "the United States gave the New York Indians land in Wisconsin for emigration." * * *

The United States gave nothing to the New York Indians except their approval of a bargain. * * *

It is plain that there is no warrant for the statement of counsel for the United States that the title to the 500,000-acre tract in Wisconsin was acquired by the claimants at the cost of the United States. (Additional Brief, pp. 7, 8, 9, 21.)

In the appellee's brief (p. 20) it is made sufficiently clear that what the United States gave up by "approving the bargain" in 1821 and 1822 was its own right to occupy all land the occupancy of which was transferred by the Menomonees or Winnebagoes to the New York Indians. This relinquishment of its rights by the United States was a gift whose value was in proportion to the value of the cessions by the Menomonees and Winnebagoes, which cessions would have been fruitless without such a gift.

Whatever be thought of the legal effect of those cessions of 1821 and 1822, it is a fact, as shown by the treaties of 1827, 1831, and 1832 (appellee's brief, p. 21), that the Menomonees denied that they had ceded any land whatever to the New York Indians, and also that the United States paid the Menomonees for every foot of land which that tribe ultimately consented to allow the New York Indians to occupy. If the payment of \$20,000 to the Menomonees, to secure an undisputed right to the New York Indians to settle on certain lands, was not in effect a free gift to the latter of an interest in those lands, it is hard to see what can ever constitute a gift; and when appellants' counsel say that the Indians' title to the 500,000-acre tract was not acquired at the

cost of the United States (Additional Brief, p. 21), or speak of the substitution of this undisputed right of settlement for the former disputed title in common with the Menomonees (a title which was little more than a right to go on the warpath against the Menomonees) as a "spoliation" (Additional Brief, p. 9), it is hard to see what meaning they attach to the words they use.

Appellants' counsel state (Additional Brief, p. 7-8) that besides the sum (only \$5,000, after all) paid by the New York Indians to secure their disputed title, "they paid out large sums for exploring expeditions for the lands purchased by them, and the removal of their people thereto." This does not appear from the findings, which state, on the contrary, that "*the defendants aided* some ten Indians representing plaintiffs in exploring," etc. (Rec., 7), while the special provisions for the Oneidas in New York and the St. Regis (arts. 9 and 13, treaty of Buffalo Creek), taken in connection with Finding XVIII (Rec., 21), show that the United States repaid to those tribes their outlay in connection with the Wisconsin lands, as was also done to the Green Bay Oneidas as to all the land which they did not retain. (Oneida treaty, 7 Stats., 566.) Whatever expense, then, the Indians had been put to in connection with that portion of the Wisconsin land, their interest in which was relinquished by the treaty of Buffalo Creek and the Oneida treaty, appears to have been made good to them by the United States.

The Additional Brief states (p. 16):

The court below found that the claimants did all that was required of them under the treaty, and that the United States got the whole consideration moving it to enter into the treaty.

No citation is made from the record in support of this extraordinary statement, which is utterly irreconcilable with the language used by the court below. As to the latter point, the opinion says expressly:

In the first place it is to be kept clearly in sight that for the promises contained in the treaty of Buffalo Creek the United States were to receive from the Indians no consideration in money or New York land, and (except in the slight emigration West, above described) have received *no consideration whatever* from the Indians.

The defendants' motive for the treaty was political. They wished the plaintiffs to move West. The plaintiffs have not moved West and defendants have failed in their purpose. (Rec., p. 40.)

Further comment upon this part of the above statement of appellants' counsel is unnecessary, and the statement that "the court below *found* that the claimants did all that was required of them under the treaty" has equally little to support it. The treaty contains the solemn promises of the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, and New York Oneidas to emigrate, and the court has stated positively that—

The mass of the Indians wished to remain in New York, or at least evinced no desire to leave it.
* * *

It can not be doubted that if the plaintiffs

in this action really wished to avail themselves of the treaty grants, the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. (Rec., 40, 41.)

If the words just quoted mean anything, they mean that the Indians did not do what they had promised to do, and that the United States was in no way responsible for the failure. To treat this as equivalent to saying that "the Indians did all that was required of them" is but to play with words.

(4.)

The Additional Brief states (p. 12) that—

The grant to the Indians, although of a legislative or treaty character only, was as effective as though made by deed of the most technical character.

Conceding the truth of this, the question still arises, What was this "grant"? Was it a real grant of lands, or was it merely a setting apart of lands to be granted or not in the future, or to be granted to a greater or less extent in the future, as circumstances should determine? Appellants' counsel can gain nothing by *calling* the transaction a grant, or by saying that it was as effectual under the treaty as it would have been had a deed been made, unless it *really was* a grant. The authorities cited are wholly beside the mark, as they relate to grants made either absolutely, as far as concerned the grantee (*Rutherford v. Green's Heirs*, 2 Wheat., 196), or upon conditions the performance of which was waived by the grantor

(*Fremont v. United States*, 17 How., 542). The present case is much more analogous to those cited and distinguished in the opinion in the Fremont case, viz, *United States v. Boisdoré*, 11 How., 63; *Glenn v. United States*, 13 *id.*, 250; *Vilemont's Heirs v. United States*, *id.*, 261. In regard to these and similar cases this court has said:

These grants were almost uniformly made upon condition of settlement, or some other improvement, by which the interest of the colony, it was supposed, would be promoted. But until the survey was made no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed, for he had paid nothing and done nothing which gave him a claim upon the conscience and good faith of the Government. * * *

It necessarily happened, from this mode of granting, that many concessions were obtained which the parties never afterwards acted on. * * * They had evidently no claim, therefore, upon the justice or conscience of the Spanish Government. It had not granted them the land and they had done nothing which in equity bound that Government to make them a title. (*Fremont v. United States*, 17 How., 542, 554-556.)

So in the present case the land was not granted, but merely set apart to be granted in the future to the tribes who fulfilled their promises of emigration. These promises were not fulfilled, and hence the claimants have done nothing which gave them "a claim upon the conscience and good faith of the Government," "nothing which in equity bound that Government to make them a title."

(5.)

The Additional Brief (p. 13) states that the court below "holds that the New York Indians had a valuable interest in their New York lands, sufficient to furnish consideration for a contract." This may have been the fact, but the court below did not so state. It said nothing whatever about the interest of the Indians in the New York lands being "sufficient to furnish consideration for a contract" (cf. Rec., 32), and for the obvious reason that no interest in the New York lands formed any consideration for the contract of the Indians with the United States. The incorrect statement in the Additional Brief is at best irrelevant, and possibly liable to mislead.

The Additional Brief (p. 13) also quotes the statement of the court below that "the amount and sufficiency of the consideration it is not our part to consider," but fails to call attention to the court's statement a few lines above (Rec., 32), that "*in agreeing to move west of the Mississippi and to surrender their Wisconsin rights the Indians furnished a sufficient consideration for the contract of 1838.*" The court stated plainly the double character of the consideration, and although it did not inquire

into the sufficiency of the consideration as a whole, it did inquire into the relative sufficiency of the two parts, and the appellants, for the matter of that, do the same. They analyze the consideration and assert that the surrender of the defeasible Wisconsin title was everything; the promise of emigration, nothing; while the court below practically reaches the reverse conclusion and holds that, the promise of emigration having failed, the United States "have received no consideration whatever from the Indians." (Rec., 40.)

In this connection, it may be well to refer to another extraordinary statement of the Additional Brief (p. 18, l. 2), "that there was no consideration, real or pretended, for the abandonment by the Indians of their claims." Had the United States induced or done anything to induce the Indians to "abandon their claims," the statement might have some relevancy; but since when has it been required, when one party to a contract has failed to perform his promise, that some new consideration should move to him before his claim upon the other party can be said to have ceased to exist, or to have been abandoned?

(6.)

Appellants' counsel lay great stress on what they call "the failure of the United States to take the initiative." They say, "If the initiative in carrying out the purpose of the treaty was on the United States and that initiative was never taken, how is it possible to talk of abandonment?" (Additional Brief, 23.) On page 22 they appear to define this "initiative" as the duty of "prescribing a time for the removal of the claimants and making

provision therefor." If by the duty of "prescribing a time" counsel mean that the President should have fixed a date after which the right of removal would cease to exist, the answer is that the treaty fixed that date (see Appellee's Brief, pp. 36-43, 75-76); but if counsel mean that arrangements should have been made with particular tribes or bands of Indians, fixing particular dates when their removal should take place, the answer is that this was done through Hogeboom in the case of the only band that wished to emigrate, and that when the time came 73 of those who had agreed to go refused.

Similarly, if by the duty of "making provision" for removal counsel mean that Congress should have appropriated \$400,000 in one lump, without regard to the number of actual probable emigrants, the answer is that the treaty did not require this (see Appellee's Brief, pp. 74-75); but if counsel mean that Congress should have provided for the removal of all who wished to go, the answer is that this, and more than twice as much as this, was done. Hence "the initiative," as defined by appellants' counsel, was either something purely imaginary and not required by the treaty, or else it has been fully taken.

On page 18 appellants' counsel go so far as to say that the court below has held, "following this court, that the Indians were not called upon to go West until the President should prescribe the time for their going and the Government should make provision therefor, which it is not only conceded but also affirmatively found was never done." Counsel omit to state, however, that the court below held that such was the case only "if we are to be purely technical" (Rec., 35), and that the ultimate

conclusion of the court was the claimants' case could not be aided by any such technicality because, the course pursued by the United States being in accordance with the wishes of the Indians, the latter have not been injured thereby. (See Rec., 42.)

Undoubtedly an "initiative" was on the Government—it was required to provide for the removal of all who wished to go and to appoint either directly or through its emigrating agent a day when the start should be made, both of which things it has done. It was also required to ascertain who wished to go, and this also it has done. To have taken a single Indian from New York against his will would, under this treaty, have been a gross violation of his personal rights, whatever other treaties may have provided in regard to the tribes who were parties to them; and this was doubly true in the case of the largest tribe—the Senecas, whose reacquisition of the title to the Allegany and Cattaraugus reservations in 1842, with full right to remain thereon forever, the United States had approved by solemn treaty.

To avoid violating the rights of the Indians and turning the treaty into an engine of oppression and outrage, it was absolutely necessary to learn how many wished to emigrate, and apparently until 1845 there was no sufficient prospect of an emigration party to warrant the appointment of an agent. When the party that was enrolled for emigration in 1845, or as many of them as finally decided to go, had departed, it was found that no others wished to go except about a dozen, who presumably were among the 17 who ultimately joined Hogeboom's party in the West.

(7.)

The Additional Brief (pp. 25-27) refers not merely to certain acts of Congress which have been sufficiently discussed in appellee's brief (pp. 80-82), but also to subsequent proceedings which never led to the passage of any act or the making of any treaty except the jurisdictional act in the present case. It is submitted that these proceedings are wholly irrelevant, the rights of the parties, whatever they may be, being unaffected by anything that took place after the United States in 1859 and 1860 asserted its title to the lands originally set apart for the Indians in consideration of their promise to remove, but to which they had failed to remove; but if these proceedings had any relevancy whatever, it would only be to show that, in spite of the stubborn and persistent clamor of the Indians to be paid for being allowed to break their promises, Congress has never consented to anything more than to allow the controversy to be judicially determined.

(8.)

The Additional Brief (p. 27) attacks the Senate's proviso as to what should be done with the balance of the land and of the \$400,000 in case of a partial failure of emigration. It is first stated that the proviso, "if it had any meaning at all inconsistent with the terms of the treaty as executed, was an attempt to add to the treaty an amendment to which the assent of the claimants was as necessary as that assent was necessary to the treaty itself." This is undoubtedly true, and in fact counsel could well

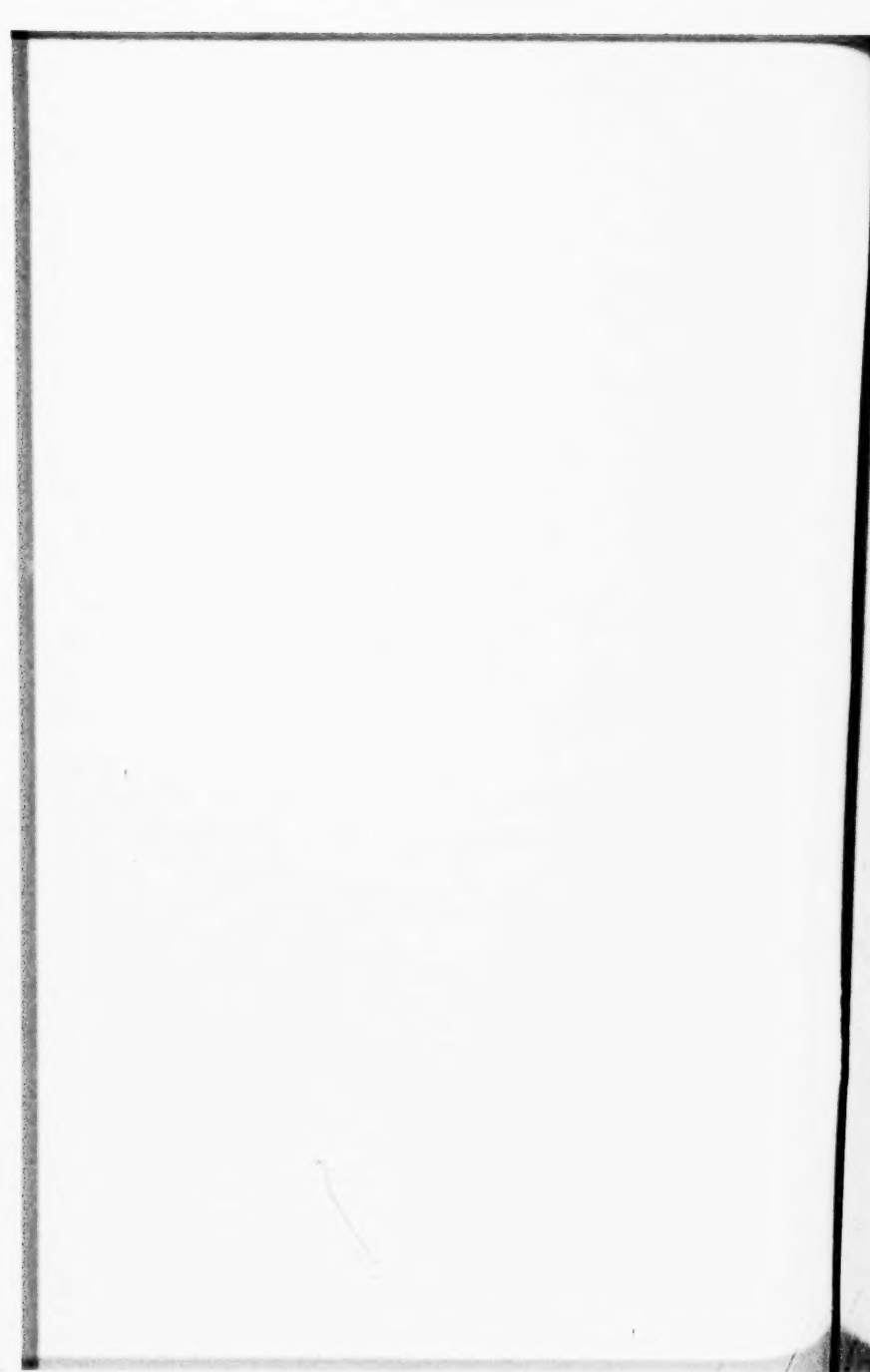
have gone further, and said that if the proviso added anything whatever to the treaty, even though perfectly consistent therewith, such assent was necessary. The answer to this statement is that such assent was given by every assenting tribe. (See Appellee's Brief, p. 62.)

It is also contended that because the President's proclamation stated that the treaty was "word for word, as follows," therefore "everything tentative in the nature of negotiation or provision in relation to the treaty not to be found in it as proclaimed 'word for word' can have no possible bearing upon the case," so that the proviso "is entitled to no consideration." (Additional Brief, p. 28.) Were this correct, then there could be no possible ground for holding that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns were parties to the treaty, for if the treaty "word for word" be the only document to look to, they certainly were not parties to it, and appellants' counsel are most inconsistent in holding that they were. The court below has held that they were parties because it understands that the Senate resolution of March 25, 1840 (Rec., 18), recognized them as such. Were the matter one of importance, it could easily be shown that the court below was in error as to this (see Appellee's Brief, p. 84), but it is undeniable that the Senate *could* have recognized them as parties had it seen fit to do so, and similarly the Senate could attach any condition to the execution of the treaty, provided only such condition was made known to the Indians, as was done with the proviso in this case,

(9.)

The argument in the Additional Brief (pp. 29-33) as to estoppel only serves to darken counsel. The vital question is, Were the Indians willing to leave their homes in New York and settle in the land set apart for them in the West within the period of five years named in the treaty, or even within any reasonable time thereafter? The Court of Claims has decided, upon all the evidence before it, that they were not willing to do so, and that the United States was justified in recognizing that to be the case and in making no further effort after June, 1846, to induce an emigration. This being so, the purpose for which the land was set apart and the consideration for setting it apart having alike failed, the United States was clearly entitled to consider it as no longer set apart, and to dispose of it in some other way.

CHARLES C. BINNEY,
Assistant Attorney, for Appellee.



N^o. 106.

MAR 2 1898
JAMES H. MCKENNE

CLERK

Brief of Atty. Gen.^e (Binney & Brad-
ford) for Appellee (on reargt.)

Filed Mar. 2, 1898.

In the Supreme Court of the United States.

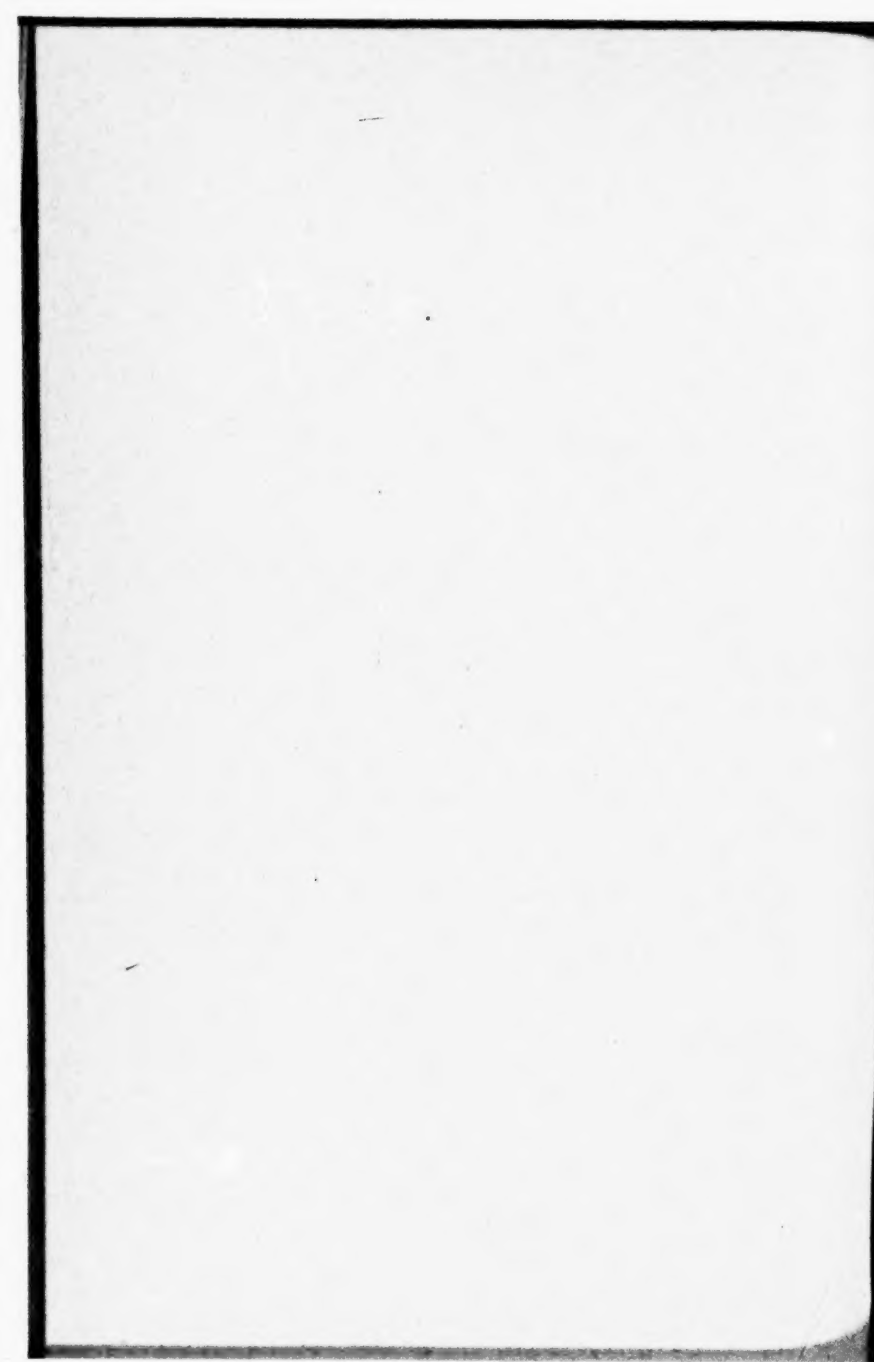
OCTOBER TERM, 1897.

| | |
|------------------------------|------------|
| THE NEW YORK INDIANS, APPEL- | } No. 106. |
| lants, | |
| v. | |
| THE UNITED STATES. | |

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF ON REARGUMENT.

(SUPPLEMENTAL TO BRIEFS PREVIOUSLY FILED.)



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

| | |
|------------------------------|------------|
| THE NEW YORK INDIANS, APPEL- | } No. 106. |
| lants, | |
| <i>v.</i> | |
| THE UNITED STATES. | |

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF ON REARGUMENT.

(SUPPLEMENTAL TO BRIEFS PREVIOUSLY FILED.)

Although the case has been set out with some fullness in the two briefs heretofore filed for the United States, some of the lines of argument taken by appellants' counsel at the former hearing, and to some extent elaborated in two additional briefs recently filed by them, call for particular notice, even at the risk of occasional repetition, which will, however, be avoided as far as possible.

I.

Before considering these arguments, however, a sense of respect for the court as well as of professional duty

compels the counsel for the United States to object and protest, most seriously and strenuously, against the attempt made in the former briefs and oral arguments of appellants' counsel, and carried still further in the briefs recently filed, to bring into the case matters which are neither a part of the findings made by the court below nor properly the subject of judicial notice. The rules of this court regulating appeals from the Court of Claims are explicit to the effect that the record shall contain "a finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, *but not* the evidence establishing them." (Rule I, 2.) And if this rule could leave any doubt as to the fact that the evidence in the court below can not be referred to in this court, such doubt would be dispelled by the distinct pronouncements of this court in *De Groot v. United States* (5 Wall., 419, 427) and other cases. For instances of disregard of this rule, see the paragraphs numbered 8, 24, and 33, on pages 7, 8, 22, 23, and 29, of the appellants' Brief on Reargument.

This court has frequently stated and has but recently reaffirmed the doctrine that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (*United States v. Freight Assn.*, 166 U. S., 290, 318, and cases there cited.) The obvious reason is that as only comparatively few members speak on any measure, and even the speakers do not all discuss the same points, it is simply impossible to discover from these debates what the opinion of the majority who vote for

any measure really is. If it be true that the debates do not show the intention of Congress as to the operation of a statute, *a fortiori* is it true that they do not show its intention with regard to a measure that fails to pass. Such a measure itself stands, of course, on a different footing from that of the debates, and if the fact that it was before a legislative body be relevant, it may be put in evidence in a trial court; but unless it is found in the record which comes before an appellate court it can not be referred to there, as the only acts of a legislature which are entitled to judicial notice are its completed acts—those to which the term “acts” should be exclusively applied, viz, statutes.

In spite of this, appellants' counsel refer repeatedly to a certain measure introduced into Congress in 1858 in the interest of the appellants, or some of them, but which failed to pass, and also to the debates upon it, although the record is wholly silent on this point. (Vide Addl. Brief, p. 26; Addl. Brief on Rearg., pp. 16-19.)

The same rule which restricts the field of judicial notice of legislative proceedings to what are technically “acts” forbids judicial notice of any executive acts except such as have the force of law. (Wharton on Evidence, § 317; Judicial Notice, 12 A. & E. Encyc. of Law, 152.) Hence a treaty is not the subject of judicial notice until it is proclaimed, although if the fact that an unratified, unproclaimed treaty was made or proposed be relevant, it may, as in the case of legislative bills which did not become acts, be put in evidence in a trial court. The same rule applies to all reports and communications of

executive officers. Appellants' counsel, however, seek to fix the court's attention upon a certain unratified treaty made with some of the appellants, as also upon the reports of certain executive officers in connection therewith, as well as other reports and communications, although the court below has not seen fit to make any findings on any of these matters. (Vide Addl. Brief, pp. 26-27; Addl. Brief on Rearg., pp. 24-32.)

If there are any matters which counsel have neglected to bring properly to the attention of the court below, such neglect can not be made up for in this court; while, if the court below has erred in excluding any evidence introduced by counsel, the findings requested, with the evidence offered in support thereof, and the refusal of the findings, should have been incorporated in the record, and special assignments of error made. Counsel seem, however, to proceed upon the theory that because a court will notice judicially the fact of the *publication* of a public document, therefore its *contents* are similarly the subject of such notice. It is submitted that there is no warrant for such a theory. The only evidential difference between a public document and any other book is that a court will take notice that it was officially published, so as to dispense with further proof of the genuineness of the papers it contains. Beyond this superior facility of proof, however, its contents differ in no evidential respect from any other similar papers. If they be statutes, treaties, proclamations, executive regulations, or the like, they are themselves the subject of judicial notice, but that is on account of their peculiar character, and has nothing whatever to do with the character of

the volume where they appear. On the other hand, if a public document contains papers which, if their genuineness were otherwise proved, would have to be put in evidence in a trial court, the mere character of the volume containing them does not obviate the necessity of such putting in evidence, nor entitle them, if not so put in evidence and incorporated into the appeal record, to be alluded to in an appellate court.

It appears that before the enactment of the jurisdictional act in the present case, the claim of the present appellants was referred to the Court of Claims by the Senate Committee on Indian Affairs under the act of March 3, 1883 (22 Stats., 485), usually known as the Bowman Act, and that that court ultimately reported to the committee certain findings of fact. The jurisdictional act of January 28, 1893 (27 Stats., 426), empowered the court below to hear the case and enter up judgment either "upon the finding of facts already made" or "if in its judgment justice so requires, [to] take other testimony as to the facts." The court proceeded to receive new evidence, and it ultimately made a new set of findings of fact, which appear in the present record (pp. 7 to 24). The old findings were, by the operation of the jurisdictional act, a part of the record in the court below, but that court has not seen fit to include them in the record on appeal, for the obvious reason that, being somewhat at variance with the new findings, they would only serve to obscure the real issues now before this court.

Appellants' counsel, however, seek to bring the old findings before this court, and have printed them in full in their Additional Brief (pp. 39-49), apparently on the

theory that they are the subject of judicial notice. As already stated, the mere fact that they were printed in a public document can not entitle them to be judicially noticed, and as the Court of Claims carefully abstained from any statement of law as bearing on the facts found, they certainly can not be cited as judicial precedents. In proceeding under the Bowman Act to find facts for the information of a Congressional committee, the Court of Claims does not sit as a judicial tribunal, but as a committee to aid Congress in the ascertainment of facts from the evidence presented. This court has held that so long as Congress retained any control over the execution of judgments rendered by the Court of Claims that court did not possess judicial power at all, and its authority was like that of an auditor or comptroller. (*Gordon v. United States*, 2 Wall., 561; opinion in 117 U. S., 697.) *A fortiori* is this the case when the Court of Claims is not authorized to render any decision as to the law of a case, but merely to report facts. It is therefore submitted that the findings in the Congressional case can not be the subject of judicial notice, and should not have been printed in the appellants' brief, nor should they now be referred to in argument.

II.

The appellants' position is based upon certain fundamental contentions, not one of which, it is submitted, can really be sustained. These contentions are:

1. That the appellants had in 1838 a perfect Indian title, unaffected by any other conditions than such as

necessarily attach to all Indian titles, to certain lands at Green Bay, in Wisconsin.

2. That the cession, by the treaty of 1838, of the Indians' right, title, and interest in a portion of the Green Bay lands constituted the sole consideration for the covenants of the United States in that treaty.

3. That the treaty of 1838 effected an exchange of these lands in Wisconsin for lands in the Indian Territory (now Kansas), whereby, in sole consideration of the cession of their rights in the former, the Indians acquired a perfect Indian title, in conformity with the act of May 28, 1830, to the latter, as well as the right to have \$400,000 expended for their emigration, settlement, etc. Until Congress appropriated that entire sum, and the President appointed a final date for the emigration of the Indians, no objection or refusal on their part to emigrate could have any effect, and even if a refusal to emigrate caused a forfeiture of the estate which the parties so refusing had in the Kansas lands, such forfeiture could not be enforced against them by executive action.

4. That the United States, in violation of its treaty covenants, failed to appropriate more than a small portion of the promised sum, or to appoint a final date for emigration, or to remove more than a few of the Indians, and, finally, took away all but a very small part of their land in Kansas, sold it, and kept the proceeds.

These contentions are not merely unsupported by evidence, but they are totally at variance with the actual facts of the case and the actual provisions of the treaties.

In opposition to these contentions, the following points are submitted :

1. The Six Nations (really five, viz, Seneca, Cayuga, Onondaga, Oneida, and Tuscarora) and the St. Regis tribe were the only ones of the appellants who, in 1838, had any title whatever to that part of the 500,000-acre tract at Green Bay which they ceded to the United States by the treaty of Buffalo Creek, and this title could have been terminated at any time by the action of the President in fixing an early date for the Indians to remove thereto or lose their title, a reasonable time for removal having already passed.

2. The cession of this defeasible right, title, and interest to the United States was only a nominal consideration for its covenants in the treaty of Buffalo Creek, the substantial consideration being the agreements to remove within five years, which the several tribes were called upon to make before they could acquire any rights whatever in regard to the lands west of the Mississippi.

3. Whatever the consideration for the covenants of the United States in the treaty of Buffalo Creek, that treaty did not effect an exchange of lands in Wisconsin for lands in the Indian Territory, nor did it vest in the appellants, or any of them, any estate, whether base fee or of any other quantity, in the latter, but merely provided that on the performance of a condition precedent, viz, actual emigration, a base fee should vest in those who emigrated, in proportion to the extent of such emigration, on the basis of 320 acres for each person. The covenant of the United States to appropriate money in aid of emigration,

settlement, etc., simply concerned those individuals who wished to emigrate.

4. The United States having, in 1846, aided or permitted the emigration of all the Indians of the tribes which were parties to the treaty of Buffalo Creek, who desired to emigrate, the President was not required to appoint any other time for removal, but was entitled, at any time thereafter, to restore to the public domain so much of the land set apart by the treaty as exceeded 320 acres for each actual emigrant who remained or whose heirs remained on the land at the date of such restoration. After the emigration of 1846 the United States was not required to appropriate or expend any portion of the \$400,000 except such proportion as the actual emigrants were entitled to have expended upon them.

These points will be considered in their order.

(1.)

THE NEW YORK INDIANS' INTEREST IN THE GREEN BAY
LANDS IN 1838.

The United States has never denied that the Six Nations and the St. Regis tribe had, in 1838, an interest *of some sort* in the tract of 500,000 acres at Green Bay, Wisconsin, and that their cession of their interest in about 435,000 acres of this tract constituted *a part* of the consideration for the covenants of the United States in the treaty of Buffalo Creek. On pages 19 to 27 of the appellee's original brief is shown at some length precisely what that interest was and how the Indians came to hold it. Briefly stated, it was an Indian right of occupancy in

500,000 acres, conditioned upon actual occupancy within such reasonable time as the President should appoint, and although no limit had actually been set to the time for occupying, yet five years, manifestly a "reasonable time," had already elapsed without any occupancy of more than 12 to 13 per cent of the whole tract.

In this connection it may be stated that whatever may have been the duty of the United States as to the removal of the New York Indians to Kansas, the suggestion has never been made that it had any duty whatever in regard to their removal to Wisconsin. At the outset the purchase of an interest in Wisconsin lands was wholly the affair of the New York Indians,* except that the United States aided them in exploring the country, and gave its consent to the purchase, without which this could not have taken place at all, for in spite of what is stated in appellants' Additional Brief (p. 5) the right of Indians to transfer their lands was wholly subject to the approval of

* It should not be forgotten that the total consideration paid by the New York Indians for the very indefinite rights acquired by them in Wisconsin lands in 1821 and 1822 was only \$4,950, chiefly in goods. (Rec., 8, 9.) In addition, say appellants' counsel, "they paid out large sums for exploring expeditions for the lands purchased by them and the removal of their people thereto." (Addl. Brief, pp. 7-8.) There is nothing in the record in support of the latter statement, and the public document referred to in the brief contains nothing on this point that is the subject of judicial notice. At the same time it is certain that some money was spent for the purposes named, because in the treaty of Buffalo Creek the United States agreed to pay \$6,000 to the Oneidas in New York and \$5,000 to the St. Regis, to reimburse them for such expenditure. This money was paid (Rec., 21), so the expenditure was ultimately borne by the United States, who had also aided the exploration in 1820-21. (Rec., 7.)

the United States. Subsequently, when the Menomonees denied the validity of the purchases, and an Indian war was threatened, the United States paid \$20,000 for an undisputed title to a tract which, though smaller than those in dispute, and in which the New York Indians had very uncertain interests at best, contained, as the Indians themselves agreed, "a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians and St. Regis tribe." No consideration had moved from the New York Indians to the United States either for its consent to the acquisition of interests in the New York lands (which consent involved a waiver of the right of the United States to the possession of whatever land the Menomonees should cease to occupy), or for its purchase of an undisputed title for the New York Indians in the place of a disputed one. Its whole action in the matter had been gratuitous and solely for the benefit of the New York Indians, and certainly it had done nothing to involve it in any further obligation to facilitate the Indians' scheme of emigrating to Wisconsin.

The extent to which the Wisconsin lands, an undisputed title to which had thus been acquired at the sole cost of the United States, could be made use of, was made to depend, reasonably enough, upon the desire of the Indians to make use of them, but, beyond fixing a reasonable time for the removal of the New York Indians thereto, the United States had no further duty in the matter. If the President named a reasonable time for emigration, and no complete emigration took place, then the unoccupied portion of the Wisconsin tract was to

revert to the United States by the force of the Menomonee treaty, to which the New York Indians had assented, without any further action, either executive, legislative, or judicial. Some of the Indians had gone to Wisconsin, and if the balance chose to go within a reasonable time and secure the land permanently, they could do so. If they did not so choose, it was their own affair and the United States had no responsibility in the matter. The treaty having been proclaimed March 13, 1833, and the United States having no duties to perform in regard to the emigration of the Indians, it is clear that by January 15, 1838, a reasonable time for that emigration had already elapsed, so that the President could, without acting unreasonably, have named a very early day as the limit of the time allowed for emigration. Had he done so, there is no likelihood that any emigration worth speaking of would have taken place, and the unoccupied portion of the Wisconsin lands would have simply reverted to the United States at the expiration of the time limited.

In short, the appellants' interest in the unoccupied Green Bay lands was in 1838 not merely defeasible, but practically certain to be defeated if the Government saw fit to resort to the simple expedient of terminating at an early day the period allowed for emigration.

In their Additional Brief (p. 8) appellants' counsel undertake to assert that the Indians' original object in acquiring lands in Wisconsin was "not the removal of the Indians from New York, but only provision for the coming generations, for the numbers of the Indians in New York were increasing," and apparently the same

assertion is made in regard to the 500,000-acre tract at Green Bay secured from the Menomonees by the United States. As to the latter, the language of the treaties of 1831 and 1832 shows clearly that a complete removal from New York was essential to a permanent right to the whole tract, and the purport of these treaties is expressed in the preamble to the treaty of Buffalo Creek in the words "five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they *all* remove to the same within three years, or such reasonable time," etc. Such language leaves nothing to discuss on this point.

As to the Indians' original intention, "the memorial of 1810" (really 1815), to which counsel refer, is not before the court, but the references thereto in the record (p. 7) and in the preamble to the treaty of Buffalo Creek make it sufficiently clear that the intention was "to seek a new home" in place of the old one. This intention was probably not unanimously held, however, even at the start, and certainly as years passed by and the Indians acquired more and more of the education and civilization of the whites, the intention to remove was gradually abandoned altogether.

(2.)

THE REAL CONSIDERATION FOR THE COVENANTS OF
THE UNITED STATES IN THE TREATY OF 1838.

The defeasible interest of the Six Nations and the St. Regis tribe in the unoccupied portion of the Green Bay

tract being as above stated, it was obviously too insignificant to form the real consideration for the promise to set apart the much larger tract of land in the Indian Territory. This is really the conclusion reached by the court below, for though the opinion does state that the interest in the Wisconsin lands "afforded substantial consideration for any contract with the Government" (Rec., 32), the final statement is that "for the promises contained in the treaty of Buffalo Creek the United States * * * have received no consideration whatever from the Indians." (Rec., 40.) Had the opinion been more carefully revised, the first of these statements would obviously have been modified so as to harmonize with the second. That the inconsistency was overlooked does not, however, affect the fact that the second statement evidently expresses the court's final conclusion in the matter, viz, that the cession of the defeasible interest in the Wisconsin lands was so small a part of the consideration that it may practically be disregarded.

Whether the appellants' interest in the unoccupied Green Bay lands was, in 1838, as small as has above been shown or as large as the appellants now contend, its cession was not the sole consideration for the covenants of the United States. The preamble, the second and third articles, and the agreements contained in the tenth, thirteenth, and fourteenth articles show that there was another consideration, viz, the emigration of the Indians to the west of the Mississippi, in accordance with the then policy of the Government. This was the real, substantial consideration for the covenants of the United

States. As the court below correctly says, "the defendants' motive for the treaty was political. They wished the plaintiffs to move west. The plaintiffs have not moved west, and defendants have failed in their purpose." (Rec., 40.)

(3.)

THE RIGHTS ACTUALLY ACQUIRED BY THE INDIANS IN
1838.

The reason why appellants' counsel insist so strenuously on the substantial character of the Indians' interest in the Green Bay lands, and on the cession of that interest as the sole consideration for the covenants of the United States in the treaty of Buffalo Creek, is to lay the foundation for the assumption that that treaty simply effected an exchange of Wisconsin lands for Indian Territory lands, so that the title of the Indians to the latter was precisely the same as their title to the former, which they assume to have been a perfect Indian title.

They say (Addl. Brief, pp. 10, 11):

It follows unavoidably that the claimants having a good and sufficient title to the Wisconsin lands, which they gave up to the United States, they acquired a full and sufficient title to the Kansas lands of the nature and character intended to be secured to them by the treaty of Buffalo Creek. * * * Not to repeat the provisions of the treaty *in extenso*, it is clear beyond peradventure that the effect of those provisions was to give the United States the Wisconsin lands *in exchange for the Kansas lands*. * * * Plainly this (the provisions of the treaty) gave the Indians a base or determinable fee, and, as this court has specifically held, *an*

exchange or purchase of lands made by treaty under such conditions gave a good title to the Indians on ratification of the treaty without the formality of patent from the United States. (Citing *Mitchel v. United States*, 9 Pet., 711.)

That portion of the opinion in *Mitchel v. United States* which counsel evidently have in mind has no reference whatever to grants to Indians, but refers only to the rule that purchases made *by individuals from Indians* gave a valid title when made at Indian treaties held by authority of the crown, and says:

It [the rule] has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. (9 Pet., 718.)

Passing on from this irrelevant citation, the next thing to note is that the treaty of Buffalo Creek did not effect an exchange of lands in the legal sense. The transaction certainly did not come within the act of May 23, 1830 (4 Stat., 411), authorizing the exchange of lands west of the Mississippi for lands "claimed and occupied" by Indians in any of the States or Territories, or, as it is expressed in the first section, "the lands where they now reside." The word "claimed," as used in that act, obviously refers to a valid Indian title, not to a defeasible title, such as the appellants had in that part of the Wisconsin lands which they proposed to cede. The word "occupied" expresses another essential condition of the validity of an Indian title, which ended with the cessation of actual occupancy. The two words together, "claimed

and occupied," cover both the essentials of an Indian title, and are equivalent to "held under a valid claim of title by actual occupancy." The only lands belonging to any New York Indians in Wisconsin which could properly be said to be "claimed and occupied" by them, or on which they "resided," were *not* ceded by the treaty of Buffalo Creek. These lands were the Stockbridge, Munsee, and Brothertown reservations on Lake Winnebago, and also the Oneida Reservation at Green Bay, which was specially excepted from the cession made in article 1. That cession was of land which was neither "claimed" nor "occupied" in the sense in which those words are used in the act of May 23, 1830. In any view of that act the land was not "occupied," and the act only applies where the land is occupied as well as claimed. The treaty of Buffalo Creek, therefore, did not and could not effect an exchange of lands within the meaning of the act of May 23, 1830.

The act of 1830, moreover, did not relate to treaties at all. It authorized the President to act alone without the concurrence of the Senate. The authority was given because the mere exchange of lands, the payment for improvements, the aid in emigration and settlement, and the protection from disturbance could properly be undertaken by the President alone (so long as he kept within the appropriations made to carry out the act), and did not involve any exercise of the treaty-making power. It was because the provisions of the treaty of Buffalo Creek, both in regard to lands and to other matters, went far beyond the scope of the act of 1830 that they had to

be embodied in a treaty, and the only bearing of the act of 1830 upon the whole transaction was that the patents to be issued under the treaty were to conform to the provisions of the third section of the act, i. e., that they were to provide for a reversion to the United States in case of abandonment by the Indians or their becoming extinct.

To effect an exchange, in the legal sense of the term—and this sense is essential to the appellants' contention—the estates must be conveyed in sole consideration of each other, and the one must be the equal in quantity of interest of the other. (2 Bl. Comm., 323.) In the present case, as has been shown above, and as the court below has held, the main consideration for the covenants of the United States consisted of the promises of certain tribes to remove within five years. As this consideration, whether it was the main consideration or not, certainly entered into the transaction, there could not have been an exchange in any proper sense of the term.

As to the estates conveyed by this so-called exchange, whether the defeasible interest of the Six Nations and the St. Regis tribe in the unoccupied lands at Green Bay could be dignified with the title of an estate at all is far from clear, but the question is hardly worth discussing, because no estate whatever was conveyed by the treaty of Buffalo Creek itself, without the happening of certain future conditions, in consequence of which an estate might then first come into existence. What the United States covenanted to do was to set apart a certain large tract of country, out of which grants were to be made in the future, a separate grant, obviously, to each tribe, nation,

or band, and the size of each grant depending on the number of emigrants belonging to each tribe, nation, or band. Neither the word "give," nor "grant," nor "cede," nor any equivalent word is used in reference to the Kansas lands from one end of the treaty to the other, but only the words "set apart," which are used in every instance. The bearing of this fact and the reason for it are considered at some length in the appellee's first brief (pp. 44-48). It is only necessary to add that the words "set apart" do not occur in any of the numerous prior treaties whereby the United States gave land to Indians. In all those treaties the usual word is "grant," though "cede," "give," "assign," "convey," etc., are also found. The reason for the difference between the language of those treaties and that of this is obvious, because in this case alone was the emigration of any considerable proportion of the Indians so uncertain that until they had emigrated it could not be known how much of the land would be required for them.

If the treaty could be held to have granted an estate, in any sense of the term, it could not have been a vested estate, nor one *in presenti*. It could at most only have been an estate upon condition precedent, which could not come into existence until the condition, emigration and occupation within five years, was performed. The United States covenanted to aid in the performance of that condition, and it announced that the time for performance might, in the discretion of the President, be extended, but it made the performance essential to the acquisition of anything that can properly be called an estate in the land.

This is substantially conceded by appellants' counsel, where they say :

In order to carry out the object and purpose of the treaty it was necessary to vest in the Indians an estate of the nature and character mentioned, for it is declared in the treaty that the lands were to be set apart as a permanent home for *the Indians who desired to remove*, and the United States promised and agreed to protect *them* [i. e., those Indians who desired to remove] in the peaceable possession of the lands and secure to *them* [i. e., the same Indians] the right to establish *their* own form of government, appoint *their* own officers, and administer *their* own laws. (Addl. Brief, p. 11.)

The above statement amounts to this: The estate granted was such as would effect the object and purpose of the treaty, viz, to provide a permanent home for the Indians who desired to remove, to whom also the other covenants of the United States were made. The phrase "the Indians who desired to remove" can not refer to a temporary desire, afterwards abandoned, but to those Indians who fulfilled their desire, or who (if any such there were) would have fulfilled it but for the failure of the aid promised by the United States. Who were these Indians? It is nowhere stated in the treaty that all the Indians desired to remove, but on the contrary it is directly implied in the preamble that many did not, as otherwise there would be no occasion for the President's determination to bring them "to see and feel" that it was "their true policy and for their interest to do so [i. e., remove] without delay." Article 3 at least implies uncertainty as to a desire for removal, and the supple-

mental article makes it clear that the St. Regis tribe, as a tribe, did not desire to remove. The treaty of 1842 makes it equally clear that many of the Senecas, and the Cayugas and Onondagas residing with them, did not desire to remove, and the court below has found as a fact (Rec., 18, 19) repeated declarations of these and other tribes that they would not remove, while of those actually enrolled for emigration, over 25 per cent concluded not to go. Until an emigration took place, it would be impossible to know who were "the Indians who desired to remove," and hence it could not be said of any tribe or individual, prior to that time, that an estate had vested in it or him.

Although admitting that the land was only intended to be granted to "the Indians who desired to remove," in whom obviously nothing could vest until they had removed, appellants' counsel still contend that the title, not of these alone, but apparently of all the Indians, was such that it could not be lost by abandonment, without some estoppel or the operation of the statute of limitations. (Points on Abandonment, p. 2.) This contention is not merely inconsistent with the previous admission, but is inherently erroneous. Whatever be the rule as to freehold estates at common law, the only estate that was promised to the Indians was one that would necessarily revert to the United States on abandonment, even if it had vested (Act of May 28, 1830, § 3; 4 Stats., 412), and certainly abandonment before possession taken would have been no less effectual than an abandonment of actual possession. The common-law authorities cited have, therefore, no bearing on the case.

The Indians had, however, not even a vested estate, but merely an inchoate right, such as is capable of abandonment. Their case was like that of an applicant for public land who fails to take the necessary steps to perfect his title.

An application vests in the applicant *a right*, though not a *perfect right*. It is the inception of a title, which may be rendered perfect by future proceedings; or it may be voluntarily *abandoned* by the applicant, or *lost* by his negligence. (*Philips v. Shaffer*, 5 Serg. & Raw., Pa., 215.)

It is true that *legal* rights once vested must be legally divested, but *equitable* rights may be lost by dereliction. (*Picket v. Dordall*, 2 Wash., Va., 106, 115.)

To the same effect are *Blaine v. Crawford* (1 Yea., Pa., 287); *Drinker v. Holliday* (2 *id.*, 87); *Ewing v. Barton* (*id.*, 318); *Gordon v. Kerr* (1 Wash., C. C., 322); *Dikes v. Miller* (24 Tex., 417).

Conceding, even, for the sake of the argument, that an estate had vested at the time of the ratification of the treaty in every one of "the Indians who desired to remove," although they were not yet ascertained, the court below has found facts which necessitate its conclusion that every one of those Indians removed and either received his allotment of land or lost it by abandonment or death. This being so, it is clear that upon the appellant's own construction of the treaty their petition was properly dismissed.

In point of fact, however, a lengthy discussion about estates, base fees, exchanges at common law, etc., serves

but to darken counsel. The document under discussion is an Indian treaty, which cannot receive a narrow, technical construction, but must be interpreted in accordance with what can either be shown or must be reasonably presumed to have been the understanding of the Indians themselves at the time. Their understanding of it years afterwards, when the actual facts and occurrences of the time had been forgotten, or the views taken of it years afterwards by officers of the United States, have absolutely nothing to do with the case.

As to the contemporary understanding of the Indians, the proof shows very little except a rooted determination on the part of the vast majority not to remove. We are therefore left to reasonable presumptions of their understanding, and in this connection it may be stated that there is absolutely no evidence that the contents of the treaty were not fully made known to the Indians. The complaints against the treaty are numerous, but these are wholly confined to the fact that it called upon them to remove, and to the assertions that it had not been executed by the proper number of lawful chiefs, and that those who executed it had been corruptly influenced by the preemption owners. The record contains no evidence of a single word of complaint that any of the Indians, whether chiefs or not, did not thoroughly understand the provisions of the treaty.

A reasonable understanding of the treaty is not difficult to reach, even though the phrasology is hardly that which a trained lawyer would have used. Whatever interest the Indians had in the unoccupied Green Bay

lands was ceded to the United States, and on the other hand the United States agreed to set apart a certain tract of country large enough to furnish a permanent home (on a basis of 320 acres for each individual) for all the tribes who it was thought, when the treaty was made, might possibly become parties thereto, which tract was to be divided up among the several tribes or bands, and patents were ultimately to be issued to each for their respective portions. Before any tribe could acquire any rights in regard to this land it must accept the country and agree to remove thereto within five years, subject to the power of the President to extend the time in his discretion. By amendment, the Senate limited the right of occupancy of the land to those Indians who resided in the State of New York, as other arrangements had been made with some of them and were in process of negotiation with others. The United States further agreed to aid in the emigration, settlement, and progress of the Indians to the extent of \$400,000, and also to pay certain sums of money to the Oneida and St. Regis tribes for expenses incurred by them in regard to the Green Bay lands, and to pay certain other sums to other tribes or individuals upon their emigration.

Except as to the payments to the Oneidas and St. Regis, which did not depend on emigration at all, and except also as to the payment of annuities (article 6), the obligation of which depended upon prior treaties, the one matter with which the whole treaty is concerned is the emigration of the Indians to the West and their settlement there. As the court below has said, "The whole

transaction was simply an endeavor on the part of the United States to move the Indians out of New York." (Rec., 41.) Unless the tribes accepted the country set apart for them and agreed to remove thither they were to have no interest of any kind therein, and, of course, no right to have any portion of the fund of \$400,000 expended for their benefit. *A fortiori* was this to the case if, having agreed to go, they failed to do so when called upon to fulfill their agreement.

As to the appellants' contention that the President was required to appoint one or more times for emigration before any rights of Indians residing in New York could be in any way affected by their failure to emigrate, the language of the treaty itself is clearly against it. Article 3 says, "to remove to the country set apart for their new homes within five years, or such *other* time as the President *may*, from time to time, appoint," words which leave it optional with the President to extend the time or not, as he might see fit, and are wholly different from the words of the Menomonee treaty of 1831, "within such reasonable time as the President of the United States shall prescribe for that purpose." Not one of the agreements to remove (articles 10, 13, 14) refer to any extension of the time by the President, while the supplemental article says, "within the time *specified* in this treaty." If, as appellants contend, the time for emigration was unlimited until the President should take action, then certainly no time whatever was specified in the treaty, and the language of the supplemental article is meaningless. The supplemental article is, however, a part of the treaty,

just as much so as articles 9 to 14, which relate to particular tribes, and as all parts of an instrument must be construed together, so as to give a harmonious interpretation to the whole, the conclusion must be that the parties to the treaty understood it as specifying a time for removal, viz., five years, subject to the discretionary power of the President to prolong it.

To express in one sentence the substantial purport of the whole treaty, the tribes who agreed to remove (or who, without agreeing, stipulated that any of their members might remove) were to have 320 acres for each member who removed (with such Government aid as was necessary) within five years, subject to the right of the President to extend the time if he saw fit, and were to have certain material aid in proportion. This being so, the second proviso of the Senate resolution of June 11, 1838, the binding force of which appellants' counsel so persistently deny, was merely declaratory of the provisions of the treaty as far as the rights of the Indians were concerned. That proviso reads:

Provided, further, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only. (Rec., 17.)

The purport of the treaty itself clearly was that if any portion or part of the Indians did not emigrate, they were not to have more of the land than would leave to each emigrant 320 acres only, and their share of the

\$400,000 was to be reduced in proportion. This proviso, therefore, in no way curtailed the rights of the Indians as expressed in the body of the treaty, but merely stated explicitly what the procedure should be in case a partial emigration left a balance of the land and money to be dealt with. The treaty did not specifically state what was to become of any such balance of land and money, and this proviso simply charged the Executive with the duty of disposing of it; and hence, even if the proviso had not been made known to the Indians, and had had no binding force as regards them, the ultimate disposition of the balance of the land by Executive act could not possibly have infringed any rights of the Indians.

(4.)

THE CONSEQUENCES OF THE NONEMIGRATION OF THE MAJORITY OF THE INDIANS.

The United States having covenanted to aid the emigration of the Indians, and having done so to a very small extent only, is properly called upon to show that the failure of further performance was caused by the appellants themselves, and the court below holds that it has done this. On the other hand the appellants deny that any of the parties to the treaty, "acting in their tribal capacity in accordance with their customs and form of government, have declared their intention to abandon the Kansas lands or done any act indicating such purpose." (Points on Abandonment, p. 5.)

As the treaty makes it clear that the Indians could not refuse to emigrate and still retain any interest in the

Kansas lands, a declaration of intention not to emigrate *was* a declaration of intention to abandon the Kansas lands, and hence the sentence just quoted must be understood as if it had read "have declared their intention not to emigrate," instead of "have declared their intention to abandon the Kansas lands." So understanding it, its correctness remains to be considered.

The court below has found, as a fact not open to discussion in this court, that "the Onondagas have officially declared that they would not remove." (Rec., 18.) Their case is therefore settled.

It has also been found as a fact that "more than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation, nor remove from it, whatever a few individuals might do." (Rec., 18.) This can mean nothing else than an official declaration of the chiefs in the tribe's behalf, made with whatever formality was requisite, and as the agreement of the Tuscaroras to remove was a tribal agreement this official withdrawal therefrom was complete, whatever a few individuals might do. Their case is therefore as clear as that of the Onondagas.

It has also been found as a fact that "the Senecas, the Cayugas, and Onondagas residing with them . * * continued to protest against the treaty. * * * These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made." (Rec., 18.) Protests from these tribes then stopped, because the latter treaty enabled them to remain on the Cattaraugus and Allegany reservations, where they are to this day,

and hence by necessary implication it nullified their agreements to remove, substituting a permission to individuals to remove. Some of these individuals went with Hogeboom in 1846, and to learn the final wishes of the balance a council was called, which was held while the emigration party was still on its way, so that the Indians were wholly uninfluenced by anything that might have occurred to the emigrants.

In view of the fact that the Government had employed an agent for eight months to assemble Indians for emigration and only 198 were finally willing to go, while 73 others at first agreed to go and then concluded to stay, it was hardly necessary for the Government to do anything more; but still, to avoid the possibility of any misunderstanding or ignorance on the part of the Indians, the council was called, and the Senecas, and Cayugas and Onondagas residing with them, attended. Had the commissioner foreseen the present suit he would certainly have obtained from each tribe a formal written declaration of refusal to remove, signed by the chiefs and headmen; but in view of the numerous protests against removal, and refusals to remove, already received, he presumably thought a multiplication of such papers unnecessary. He therefore followed the course usually adopted in conferences with Indians, i. e., he took down the statements of the chiefs and reported them to the Indian Office. In addition to this he held an enrollment of two full days, during which only 7 persons requested to be enrolled for emigration, and 5 more were vouched for as wishing to go. (Rec., 19, 20.) Ultimately 17 went. (Rec., 19.)

It is submitted that the report of a public officer, charged with the duty of ascertaining facts, must be taken as true until proved to be false. It is always presumed, in the absence of evidence to the contrary, that public officers act with due caution and good faith in the performance of their duty (Throop on Public Officers, §§ 558, 567; Mechem on Public Officers, § 579), and hence, where an officer's duty requires an official statement of facts such statement is presumed, *prima facie*, to be true. The general doctrine is too familiar to call for a detailed reference to cases which have upheld it, but *Washington v. Hosp* (43 Kans., 324) and *Rogers v. Jennings* (3 Yerg. Tenn., 308) may be cited as instances of the particular application just referred to. In the present case the commissioner was appointed to represent the United States at a council called "to learn the final wishes of the Indians as to emigration," (Rec., 19.) In the performance of his duty it was absolutely necessary for him to call upon the chiefs, the official representatives of the tribes, to state what those wishes were, to hear what they had to say, and to report it accurately to the Indian Office. To have failed in any of these points would have been a gross breach of official duty, and as there is absolutely nothing in the evidence to cast the slightest suspicion upon him, he must be presumed to have fulfilled his duty, and his report of the official declarations of the chiefs must be taken as true. Furthermore, a public officer is called upon to act with caution and discretion, and hence this commissioner's action in testing the correctness of the chiefs' statements by

holding an enrollment himself may fairly be regarded as coming within his official duty, and, this being so, his report of the enrollment was also a matter of official duty, and hence its correctness may be presumed.

The court below has epitomized the commissioner's official report in Finding XIII (Rec., 19, 20), a finding which appellants' counsel, in their Points on the Question of Abandonment, call "worthless and unreliable." The attack on this finding is really an attack, unsupported by an atom of evidence, upon the commissioner's correct performance of his official duty. It assails the representative character of the council, the veracity of the report of the official statements of the chiefs, and the good faith and diligence of his enrollment.

More than this, counsel deny the existence of certain evidence which they, reasonably enough, seem to think ought to have been before the court below in order to enable it to make its finding. They say "the commissioner *did not report* what the chiefs said to him on that subject" of emigration. (Points on Abandonment, p. 8.) If it were allowable to call this court's attention to the printed record of the evidence in the court below, it would be very easy to see whether this statement is true or false; but even as it is the language of the finding is a sufficient answer. Counsel say, "he simply *stated in his report* that the chiefs were of the opinion 'that scarcely any Indians who wished to emigrate remained.'" The finding, however, says that he "*reported* * * * that the chiefs were unanimous in the opinion," etc. The finding does not say *how* he reported it, because that

would be a matter of evidence, which could not enter into the finding, which properly states the fact that the unanimous opinion of the chiefs was reported. The presumption is that, in support of this finding, the court had before it *the best evidence*, viz, a report of the very words of the chiefs taken down at the time.

Counsel also contend that the finding does not indicate "that either of the tribes therein mentioned, or any individual Indians referred to, had an intention to abandon their interests in the Kansas reservation." (Points on Abandonment, pp. 7-8.) The intention of the Indians is really immaterial, because they could not, under the treaty, both stay in New York after the Government was ready to take them west and retain any right whatever in the western lands. Moreover, this is so plainly shown by the treaty, to say nothing of the Senate proviso, that the Indians must have known it, and their intention must be judged of by their knowledge.

It is also said, in connection with the attack on Finding XIII, that "the Commissioner of Indian Affairs, without direction from the President, had no power to negotiate on any question relative to the rights of the Indians in the Kansas reservation" (p. 9). The answer to this is that the Indian Commissioner is the President's agent in dealing with Indians, and the law provides that he—

shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of *all* Indian affairs and of *all* matters arising out of Indian relations. (R. S., § 464.)

In view of these broad powers and of the presumption that an officer acts within the scope of his authority (Throop on Public Officers, § 558), had the Indian commissioner undertaken to do what counsel suggest, his lack of authority would have to be proved, but all that he did seems to have been to *call* a council "to learn the final wishes of the Indians," and certainly this would seem to be within his power. What was done at the council was done by "the commissioner who was sent *on the part of the United States*" (Rec., 19), and these words of the finding necessarily imply that he was sent either by the President or the Secretary of War. The sending of a commissioner implies, moreover, Executive approval of the calling of the council in the first instance.

Counsel also state (Points on Abandonment, p. 9) that the fact that while the council was in session the emigration party was on its way "conclusively indicates that the Indians had not abandoned their title to the Kansas reservation, and that the Government did not suppose that they had." Undoubtedly this is true as regards the Indians who emigrated, while as to some of the others the Government seems to have been in doubt, and called the council in order to make certain. After the declarations of the council there could be no more room for doubt, and it was definitely ascertained that as to the tribes called thereto the condition precedent to the vesting of an estate in the Kansas land would not be performed except by those who had gone and by a very few others who subsequently went.

It has also been found as a fact that "in 1848 and prior thereto," a large number of the Oneidas in New York emigrated to the Oneida Reservation in Wisconsin. (Rec., 24.) This emigration, which must have begun even before the emigration to the Kansas lands, in 1846, sufficiently manifested the determination of the Oneidas in the matter, except as to the few who went with Hogeboom.

The record is silent as to the St. Regis tribe, but it is to be observed that this tribe had never agreed to remove, but had merely stipulated that individuals of their tribe should be "at liberty to remove" within "the time specified in this treaty." (7 Stats., 561.) If any such individuals wished to remove, and did not need aid in so doing, all they had to do was to go. If they needed aid, it was their plain duty to notify their agent. If they did so, it is to be presumed that he saw to their going with the Hogeboom party. At all events, in the uncertainty of any of them wishing to remove, it was for them to notify the Government and not for the Government to solicit them. The total silence of the record as to any desire for emigration on their part indicates that no such desire existed, especially as the Government did not neglect them, but duly paid them the \$6,000 which were promised them in the treaty without any condition as to removal.

Whether the other appellants—the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns—were *parties* to the treaty or not, the absence of all proof of any acceptance of the country and agreement to remove thereto, necessarily debars them from all right therein, by the direct operation of article 3.

It appears, therefore, that every tribe, nation, and band that had a right to claim aid in removal to the Kansas lands has emphatically shown, either by words or deeds, that as a tribe it had no desire to make use of such aid or to occupy the land; and further, that all the individuals who wished to go when the United States was ready to have them go were allowed, and even aided, to do so. In other words, all those who wished to perform the condition precedent to their acquiring an estate in the Kansas lands did so, and the others declared that they would not. This being so, the United States was relieved of all further obligation in the matter beyond seeing that those who emigrated and remained received their lands and the aid promised them.

In regard to this whole matter of the refusal of the Indians to emigrate, it should be remembered that the Government was at all times in a position to know what the wishes of the Indians were. The Bureau of Indian Affairs, as is well known, has for years maintained agents, who reside among the Indians, at least one agent for each tribe or group of tribes, to furnish a constant means of communication between the Commissioner and the Indians. Hence the subagent and the interpreter of the New York Indian agency were among the witnesses to the treaty of Buffalo Creek. Among the duties of the agent to the New York Indians was the payment of the permanent annuities due under prior treaties, viz, \$4,500 to the Six Nations together and \$6,000 to the Senecas. It was also his duty to hear their requests or complaints at all times and to transmit them to the Commissioner. If there had been any prospect in 1846 of inducing any

further emigration of the Indians, or any opposition to the decision against removal announced by the chiefs at the council of that year, assuredly the Government would have known it through the agent. Silence on the Indians' part as to emigration—and the record indicates that there must have been such silence after 1846—was therefore most significant, as they had at all times a means of making their wishes known to the Government at Washington.

THE APPELLANTS' CASE DEVOID OF EQUITY.

The gravamen of the injury inflicted on the Indians, according to appellants' counsel, is that without having appointed a final date for the emigration of the Indians, and without having appropriated more than a small part of the fund promised for their emigration, settlement, and improvement, the United States disposed of all the unoccupied land. Conceding, for the sake of the argument, the obligation of the United States to do both of these things, and that it has done neither, it still does not follow that the appellants have suffered any loss or have any just claim on the United States in consequence. The jurisdictional act does not contemplate punitive damages, or compensation for any merely technical injury, but simply compensation for the extent to which, if at all, the Indians were worse off by reason of the failure of the United States to perform its alleged covenants, as to appointing a time and making the appropriation, than they would have been if it had performed them. It is submitted that this alleged failure in no way changed the position of the Indians for the worse.

The court below has found as facts proved by the evidence that the Indians made numerous protests, during more than five years after the treaty was ratified, against being called upon to remove, although some Indians did apply for aid in removal; that Hogeboom, having been appointed emigration agent in 1845, only mustered 271 persons for emigration, not all of whom went; that immediately after the departure of his party a well-attended council of the Senecas, Cayugas, Onondagas, and Tuscaroras was held, where it appeared that at most only 12 other persons wished to emigrate; that 17 other Indians did subsequently emigrate, and that a large number of the Oneidas (the only tribe which had agreed to go, that was not called to the council) emigrated to the Oneida reservation in Wisconsin. (Rec., 19, 24.) From these facts the court below has concluded that "the Indians did not wish to go; * * * [the treaty] removed as many of the Indians as wished to go—a very insignificant minority; * * * [the United States] moved all the Indians who then or since (as far as shown) have ever wished to leave New York for the Kansas lands." (Rec., 41.) No other conclusion could possibly have been warranted by the facts.

This being so, it is clear that if the United States had, in 1846, done precisely what appellants' counsel contend it should have done, viz, appropriated the balance of the \$400,000 and appointed a final date for emigration, the result would not have been changed. When the United States appointed an emigration agent, who enrolled a certain number of persons, some of whom went with him, and the rest of the Indians declared that they would not go, except a very few individuals who ultimately went,

it would have been a mere empty form to have appointed a further and final time for emigration. When the United States had appropriated money enough to remove, and to support for some time at their new homes, more than twice as many persons as could be induced to go, it would have been a mere empty form for it to have appropriated more. It was neither the failure to fix a final time for emigration nor the failure to appropriate \$400,000 that prevented a substantial removal, but simply and solely the fixed determination of the great majority of the Indians to remain in New York.

Even on the appellants' own theory of the duties of the United States under the treaty their present claim is utterly inequitable. The claim is based upon the contention that although it is clear from the record that if the United States had, in 1846, appropriated the full sum of \$400,000, and had fixed a final day for emigration, and had sent Hogeboom or some other agent back to enroll another party, no one would have gone, yet because it did not do so, but allowed white settlers to occupy the land and ultimately opened it up to white settlement, the fact that in 1846 all the Indians who wished to emigrate had done so is immaterial. This contention makes the appointment of a final day and the appropriation of a fixed sum of money more important than the determination of the Indians on the question of emigration. In fact, it makes these alleged duties of the Government all important and the determination of the Indians a matter of no moment whatever. This is not merely utterly inconsistent with counsel's own admission that "it is declared

in the treaty that the lands were to be set apart as a permanent home for *the Indians who desired to remove*" (Addl. Brief, p. 11), but absolutely inequitable as well, because the alleged failures of the United States were not the cause why the Indians did not emigrate.

To reconcile their claim with equity, even conceding that the obligations of the United States were what the appellants contend, they should prove that there were Indians who would have gone to the Kansas lands in 1846 with Hogeboom, but were kept in New York by the failure of the Government to aid their emigration, and they should prove the number of such Indians with some reasonable degree of certainty. They have not merely utterly failed to furnish such proof, but they have disregarded the irrefutable evidence of the Indians' refusal to go, and although the record shows conclusively that they did not wish to go they still do not hesitate to press a demand for nearly \$2,400,000 for not being compelled to do what they did not wish.

THE ARGUMENT FROM THE ACTS AND DECLARATIONS OF THE PARTIES.

In the attempt to reconcile this claim with law and equity appellants' counsel devote a portion of their Additional Brief (pp. 25-27) and all of their Additional Brief on Reargument to the contention that the course pursued by the parties to the treaty of Buffalo Creek shows that the Indians never intended to abandon their right to occupy the lands set apart under that treaty, and that the United States never intended to appropriate

the unoccupied portion of those lands without compensating the Indians therefor. In answer to this contention it is submitted, first, that the acts and declarations relied on, so far as they appear in the record or are the subject of judicial notice, utterly fail to sustain it, and secondly, that even if the contention were true as to the Indians it would be irrelevant, because the treaty gave the Indians only one mode of fulfilling an intention to occupy the lands, viz, by emigrating thereto, in accordance with their promises, within five years, or later if the President saw fit to allow more time; and when an opportunity for emigration was given, shortly after the expiration of the five years, very few went, and all the rest made it clear that they would not go.

The acts and declarations referred to by appellants' counsel, as well as others which should have been referred to to make the series complete, will be considered in their order.

A.—FROM THE MAKING OF THE TREATY TO ITS PROCLAMATION.

Appellants' counsel devote pages 2 to 5 of their brief on reargument to evidence of the due ratification and proclamation of the treaty, although no attempt has ever been made to assail them. It is extraordinary, however, that counsel have seen fit to omit the Senate's first resolution of ratification, although it is specially referred to in the proclamation, which was made "in pursuance" thereof. The omission is therefore now supplied, and the resolution should be read into appellants' brief before the resolution of March 3, 1839, on page 2.

June 11, 1838.

The Senate resumed, as in Committee of the Whole, the consideration of the treaty with the New York Indians, and the article supplemental thereto.

On motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the Committee on Indian Affairs, and determined in the affirmative, yeas 33.

No further amendments having been made the treaty was reported to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo Creek, in the State of New York, the 15th day of January, in the year of our Lord, 1838, by Ransom H. Gillett, a commissioner on the part of the United States, and the chiefs, headmen, and warriors of the several tribes of the New York Indians, assembled in council, with the following:

AMENDMENTS:

[Here follow the amendments.]

Resolved, further (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, which was made at the council house of St. Regis on the 13th

day of February, 1838: *Provided*, The chiefs and headmen of the St. Regis Indians, residing in New York, will in general council accept of and adopt the aforesaid treaty, as modified by the preceding resolution of ratification.

Provided always, and be it further resolved (two-thirds of the Senate present concurring), That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands separately assembled in council, and they have given their free and voluntary assent thereto, and if one or more of said tribes or bands when consulted as aforesaid shall freely assent to said treaty as amended and to their contract connected therewith it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

The Senate proceeded, by unanimous consent, to the consideration of said resolutions.

On the question to agree thereto,

It was determined in the affirmative, (Yeas . . . 33
Nays . . . 2

* * * * *

Ordered, that the Secretary lay this resolution before the President of the United States.
(Record, 10-17.)

The significance of this resolution, especially the final proviso, and the facts that it was fully made known to the tribes before their assent to the amended treaty, that the assent applied to that proviso, that the proviso was never repealed or withdrawn, that the President's proclamation made it a part of the law of the land, and that it was ultimately acted upon, are all fully considered in appellee's original brief (pp. 59-65) and also in the supplemental brief (pp. 15-16). While the Constitution gives to the President alone the power to make treaties, he can only do so "by and with the advice and consent of the Senate," and "provided two-thirds of the Senators present concur;" and undoubtedly the Senate can couple with their consent whatever conditions they may see fit to impose. Should the President disapprove the conditions, he may decline to proclaim the treaty; but if he proclaim it, the conditions necessarily attach, at least as far as the United States are concerned. Where the conditions do not affect the rights of the other party to the treaty, acceptance by the other party is immaterial, and in the present instance the proviso would seem, as has been stated above, to be of that character: but, in point of fact, the terms of the Indians' declarations of assent indicate that it must have been made known to them, unless it was deliberately suppressed, but such suppression can not be presumed, and it would be difficult to imagine a motive for it. The proviso was an integral part of that resolution of June 11, 1838, by authority of

which the treaty was proclaimed, and hence the fact that the President adopted the proviso, and intended that it should take effect if the circumstances which it contemplated arose, can not admit of a doubt.

As to the other acts and declarations cited by appellants' counsel, down to No. 4 inclusive, it is only necessary to correct certain errors of statement in No. 4. There is no assent "by the Oneidas, for themselves and their parties." The assent, though signed by three "parties" of Indians, is by "the Oneida tribe of New York Indians," an organization which, as is well known, was distinct from that of the Oneidas residing at Green Bay, with whom the United States dealt separately, both in making the original treaty, before its amendment, and in making the treaty of February 3, 1838. (7 Stats., 566.) The assent of the Onondagas, moreover, was confined to those "residing on the Seneca reservations."

B.—FROM THE PROCLAMATION OF THE TREATY TO THE EMIGRATION AND COUNCIL OF 1846.

The acts and declarations of this period are those numbered 5 to 11, inclusive. (Appellants' Brief on Rearg., pp. 5-9.)

The statement in No. 5, that there were 1,300 New York Indians in possession of the Green Bay lands, is not merely totally unsupported by the record, but is at variance with the treaty itself, which states, in Schedule A, that 600 Oneidas resided at Green Bay. The additional 700 have obviously been obtained by adding the numbers of the Stockbridges, Munsees, and Brother-towns in the same schedule, there being 710 of them

altogether. It is true that they did not live in New York, but neither did they live at Green Bay. They lived on their own reservations on Lake Winnebago, given them by the United States under the Senate proviso to the Menomonee treaty of 1831. (7 Stats., 347-348, 407.) The 600 Oneidas mentioned in Schedule A probably included a few individuals of other tribes, who, having settled among them, were classed with them; but at all events there is no evidence that more than 600 persons, presumably a round number, were settled at Green Bay in 1838.

It is also stated in No. 5 that these 1,300, really 600, Indians "withdrew to the reservation of 65,000 acres reserved in article 1 of said treaty." The word "withdrew" plainly implies that some of them were formerly settled outside of that reservation. This suggestion is both unsupported by evidence and at variance with the treaty. The tract excepted from the cession in article 1 was that "on which a part of the New York Indians now reside," words which necessarily imply that the balance was unoccupied, especially as, by the Menomonee treaties of 1831 and 1832, it was only the unoccupied land the Indian title to which was defeasible, and the preamble to the treaty of Buffalo Creek, which refers to the partial failure to emigrate, indicates no intention to disturb whatever emigration and settlement had been already effected. The Oneida treaty of February 3, 1838, however, sets the matter absolutely at rest by providing that the lines of the reservation "shall be so run as to include *all* their settlements and improvements in the vicinity of Green Bay." (7 Stats., 567.) The reservation bounded

by those lines was the one actually made under the treaty of Buffalo Creek, the boundaries mentioned (somewhat indefinitely) in that treaty not being precisely regarded. (Rec., 20.) Hence it is clear that the Indians on the Green Bay tract in 1840 did not withdraw at all, but remained on their settlements, and the lines of the reservation were drawn around them. No "possession" whatever was surrendered by the Indians, as erroneously stated by counsel. (Brief on Rearg., p. 6, line 2.) As to the quantity of land ceded, the record does not state that it was 500,000 acres, as stated on page 5. All that the treaties of 1831 and 1832 had provided for was 500,000 acres, of which the Oneidas occupied and retained 65,000. The balance was 435,000, and the record shows no greater amount.

As to No. 6, it is true that the treaty of May 20, 1842, recognized the validity of the treaty of 1838, but it is equally true that it made an important change in the operation of that treaty, by releasing the Senecas, and the Cayugas and Onondagas residing with them, from their agreement to emigrate, and substituting an agreement that such individuals as should emigrate under the provisions of the former treaty should be entitled to its benefits "in proportion to their relative numbers." (7 Stats., 590.) This change was much more than a mere "provisional arrangement" between the Senecas and the Ogden Land Company, as suggested in appellants' Additional Brief (p. 12). The effect of the treaty of 1842 is considered at length in appellee's original brief (pp. 52-58).

The setting apart of the Kansas lands, referred to in No. 7, followed necessarily upon the proclamation of the treaty of 1838, but had absolutely no effect whatever upon the rights of the Indians as established by that treaty.

No. 8 refers wholly to acts and statements which are neither of record in this court nor the subject of judicial notice. Counsel for appellee objects, therefore, to the consideration of any part of No. 8. Even if the documents from which these statements are culled were admissible in this court, the whole would have to be given, and not mere excerpts from them.

No. 9. The appropriation of \$20,477.50 on March 3, 1843, has no bearing on the appellants' contention, because it was made more than two years before the period of five years, allowed for emigration, had expired. The statement that this appropriation was made in pursuance of a prior request of certain Indians may be true, but is wholly outside of the record. The contents of the Senate document referred to are not the subject of judicial notice.

Nos. 10 and 11 should be transposed, as the former was subsequent to the latter.* The findings of the court below as to this are perhaps slightly confusing, but, when

* Attention must also be called to the transposition and misquotation of statements from the findings in appellants' Additional Brief (p. 25) as to this same point. It is there said:

In 1845 (Rec., p. 19) the Government appointed a commissioner to conduct and superintend such removal. Prior to November 24, 1845 (Finding 12, Rec., p. 19), some of the claimants made *further* application for removal, but it was not deemed by the Government expedient to enter into arrangements for this purpose until it was believed that a sufficient number to justify the expenditure incident to removal were prepared to remove.

properly understood, they show the correct order of the occurrences. The first statement in the findings as to this matter is that "prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration." (Rec., 19.) How long "prior" to November 24, 1845, this took place is not stated, but it must have been some considerable time prior, because the next statement is that it was not deemed expedient to comply with the request at that time. At all events it must have been before 1845, because in 1845 the request was renewed through Hogeboom and was granted. Hogeboom was emigration agent through the balance of 1845 and the first half of 1846 until the emigration, which was finished by June 15, 1846. The findings do not state when the party started, but as most of the journey was in that day necessarily by steamboat, the trip would take from three to four weeks at that period of the year.

Substituting, therefore, the actual statements of the findings for the statements of the brief, all that these incidents show is that though the request of the emigration party was, for sufficient reasons, not at first complied with, yet ultimately it was complied with shortly after the expiration of the five years, but not even all of those who were enrolled by Hogeboom could finally be induced to

The word "further" is an interpolation, not to be found in the findings of the court below, while the collocation of the two sentences above quoted, placing them in the reverse order to that in which they occur in the findings, tends to give the wholly erroneous impression that the application "made prior to November 24, 1845," was subsequent to the appointment of Hogeboom and was made by other Indians than those who went with him.

go. Undoubtedly this indicates that the United States had no intention of disposing of the land set apart for the Indians until all those who wished to emigrate had been given an opportunity to do so, and that for their benefit the period of emigration was prolonged beyond the five years, but it in no way indicates an intention to prolong the time after it had been made clear, as Finding XIII (Rec., 19) shows, that no more of the Indians wished to go.

In any complete statement of the course pursued by the parties to the treaty there should be noted, after the emigration of 1846, the steps taken to ascertain whether any further emigration was desired. It has been sufficiently shown in the earlier part of this brief that all steps necessary to this end were taken, so that they need not be again referred to here. It is clear, as to all the acts and declarations of the parties down to the emigration and the council of 1846, that the United States was willing to aid the Indians to emigrate, even after the five years, "the time specified in this treaty," had elapsed, and that it did afford the Indians all the aid necessary. After the council of 1846, it was manifest that there would be no further emigration, save of the few stragglers who followed after Hogeboom's party, and the obligation to aid in emigration and to keep the lands set apart ceased with the necessity for such aid and such setting apart.

C.—FROM THE EMIGRATION AND COUNCIL OF 1846 TO
THE PROCLAMATIONS OF 1860.

This period is covered by Nos. 12 to 24 inclusive of the matters referred to in appellants' Brief on Reargument.

No. 12. The appropriations made by the act of June 27, 1846 (9 Stats., 33, 34),* had absolutely nothing to do with emigration whatever, and has no bearing either for or against appellants' contention.

No. 13. The appropriations † of July 29, 1848 (9 Stats., 261), were made to Indians who had emigrated in 1846. (Rec., 21.) In the quotation from the statute in the Brief on Reargument (p. 11) the important word "emigrant" is omitted. The statute made an appropriation for the "proportionate share" due to "the emigrant Tuscaroras." The fact that no appropriation was made for payments to Indians who had not emigrated shows that the words of the treaty—"The United States will pay to the Tuscarora Nation, on their settling at the West, \$3,000, to be disposed of as the chiefs shall deem most

* Appellants' Additional Brief (p. 25) refers to an act of September 21, 1846. There was no such act, the session having closed on August 10.

† The reason why appellants' counsel refer to the various appropriations for the payment of sums promised in the treaty, either unconditionally or on a condition of emigration which was fulfilled (which appropriations have, therefore, no bearing on the present case), is made clear by the first paragraph of the Points on Abandonment, as follows:

The court below dismissed the appellants' petition upon the ground that they had abandoned all the rights and interests secured to them under the treaty of 1838. This appears in the opinion of the court as printed in the case.

Assuming the court below to have so stated, counsel point to these appropriations as evidence that at various dates down to March 3, 1857 (11 Stats., 184), money was appropriated to fulfill provisions of the treaty, the Government recognizing it as still in force. It is clear from this, they argue, that the court below erred in saying that the Indians "had abandoned all the rights and

equitable and just"—were taken literally, and that emigration was held to be a condition precedent. As far as this goes it is adverse to the appellants' contention.

No. 14. That the Kansas-Nebraska act of May 30, 1854, fails to support the appellants' contention has been sufficiently shown in appellee's original brief (pp. 80, 81). The words "New York Kansas reserve," used by appellants' counsel as if they were a quotation, are not found in the statute.

No. 15. The appropriation of March 3, 1857 (11 Stats., 184), was for a man who had emigrated in 1846 (Rec., 21), and is precisely on the same footing as the appropriations of July 29, 1848, referred to above.

No. 16. The decision in *Fellows v. Blacksmith*, rendered in 1857, is sufficiently discussed in the appellee's

interests secured to them under the treaty." *Ergo* the court erred in dismissing the petition.

The trouble with this argument is that the court below did *not* place its decision on any such ground. What it said was this:

The Buffalo Creek treaty has vanished, leaving no rights or duties behind it in so far as this litigation is concerned.

The treaty failed. It was not rescinded; it was not violated; but it did not accomplish its full purpose. (Rec., 41.)

The court below has expressly limited its statement as to the abortive character of the treaty to the claims now in issue. It held that the treaty as a whole had never been rescinded, but that the operation of circumstances provided for in the treaty itself had terminated the principal rights and duties thereunder. As to the other matters provided for in the treaty, the court has found as a fact that certain payments were made. (Rec., 21.) This finding was necessary, because the fact of payment did not prevent these items from being included in the claim as presented in the petition. (Rec., 5.)

original brief (pp. 32-35). It related to the exceptional case of the Tonawanda band, and not to the wholly different condition of the other nonemigrating Indians.

No. 17. The peculiar circumstances which led to the Tonawanda treaty of November 5, 1857, are discussed in appellee's original brief (pp. 78, 79; see also 32-35), where the same argument is made as was made in the court below and referred to in the opinion (Rec., 39) without either approval or dissent, the court regarding it as sufficient "that the Congress paid the Tonawandas and did not pay the other New York Indians." The quotation from that page of the record, however, made in appellants' Brief on Reargument (last five lines of p. 15 and first two of p. 16), is *not* from what the court said, as erroneously stated, but from the argument of counsel for the United States, quoted by the court. The court did not say that the Tonawandas had in 1857 any right whatever to the land in Kansas under the treaties of 1838 and 1842. Counsel for the United States said so and say so yet, but for reasons which do not apply in the case of any of the other Indians.

The fifth paragraph on page 15 of the appellants' brief on reargument relates wholly to matters which are neither in the record nor are the subject of judicial notice. This paragraph is covered by the objection made above on this point.

Nos. 18 and 19. The matters referred to under these numbers are outside the record and not the subject of judicial notice. All reference to them is objected to, although, if they could be considered, the fact that the

appropriation sought was never made would be clear evidence that the Government did not at that time recognize the validity of the appellants' claims.

No. 20. The appropriation made to fulfill the Tona-wanda treaty of 1857 stands on the same basis as that treaty, which has been referred to above and in appellee's original brief (pp. 78-79).

No. 21. The decision in *State of New York v. Dibble* has no real bearing on the issues raised in this case. (Appellee's original brief, pp. 32-33.)

No. 22. The act of March 3, 1859 (11 Stats., 431), only referred to the Indians who had emigrated. (Appellee's original brief, p. 82.) The act of May 8, 1858 (11 Stats., 269), for the admission of Kansas, referred to in this connection in appellants' additional brief (foot of p. 25) has not a word as to the rights of the Indians.

No. 23. The contention that the Secretary of the Interior's order of March 21, 1859 (the quotation from which is outside the record), was beyond his power, rests on a forced construction of the statutes previously referred to, in accordance with an imagined "purpose of Congress." The closing statement that there had not "been a forfeiture claimed by the Government during that period of nineteen years" is beside the mark. The failure to perform the condition precedent having become absolute in 1846, the estate which would have vested on the performance of that condition could not vest unless the Government, by some positive act, having the force of law, waived the necessity of performance. This it never did, and its mere inaction for thirteen (not nine-

teen) years could not affect the matter. When an appropriate time for action came, it acted with precisely the same effect as if it had acted in 1846 or at any subsequent time.

No. 24. The reference to the record in the court below is subject to the objection made at the beginning of this brief. The fact that the President, on December 3 and 17, 1860, approved the survey ordered by the Secretary of the Interior in March, 1859, and proclaimed the unallotted balance of the Kansas lands to be part of the public domain, in spite of the protests of counsel for the Indians, shows that the Government was convinced that it had a right to do just what it did.

During this entire period there does not appear to have been a single act of the Government which recognized either that the Indians had any rights in the unoccupied part of the lands originally set apart for them, or which expressed an intention to grant them any rights therein, or to compensate them for any loss of such rights, saving only in the case of the Tonawanda Senecas. The court below holds that the peculiar treatment which those Indians received has no bearing on the present case, so that it is needless to seek to explain it. If, however, an explanation be desirable, it is easily furnished by the peculiar circumstances of their case. As to the rest of the Indians, the views and attempts of certain individual legislators, lending a ready ear to the *ex parte* arguments of specially retained counsel, could not, even if they were in evidence, have the slightest effect to alter the position which the Government, alike by its silence and its acts, is shown to have taken.

D.—FROM THE PROCLAMATIONS OF 1860 TO THE PASSAGE OF THE JURISDICTIONAL ACT.

Nos. 25 to 35, inclusive, cover this period in appellants' Brief on Reargument.

No. 25. The act of January 29, 1861 (12 Stats., 127), only refers to the rights of "the Indians in said Territory" of Kansas. The language is clear and exclusive. No reference to the Indians in New York can by any possibility be construed out of it.

Nos. 26 to 34. This portion of the Brief on Reargument is objected to *in toto*, for the reasons stated at the beginning of this brief. It is wholly outside of the record, and relates to transactions which never developed into such acts of the Government, either executive or legislative, as can be judicially noticed. If these transactions were in evidence, they would not help the appellants' contention as to what they assume to have been the purpose of the Government, for they would show that though the Senate had a treaty before it for over two years, it could not be induced to recognize even a portion of the present claim.

E.—THE JURISDICTIONAL ACT.

No. 35. The reference to the findings made by the Court of Claims in the Congressional case wherein the appellants were petitioners has already been objected to as going outside of the record. The same objection is made to the report of the Senate committee upon that case. Even if these matters could properly be brought before this court, the only legitimate conclusion to be

drawn therefrom would be that Congress, by the jurisdictional act, has concluded that the case was not one with which a legislative body, even the highest in the land, could satisfactorily deal, but that a judicial trial and determination thereof were necessary.

Reviewing the course of the parties down to the date of the jurisdictional act, it appears that the Government has performed all of its treaty covenants as to matters not dependent on the emigration of the Indians. As to emigration, until the sale of the Seneca reservations to the Ogden Land Company was partially annulled by the treaty of 1842, it was useless for the Government to attempt to carry out the first treaty, in the face of the bitter opposition caused by that sale. After the treaty of 1842 enabled the Senecas to remain permanently on two of their reservations, the opposition to the first treaty quieted down. At the request of the emigration party an appropriation to aid in removal was made in 1843 and an emigration agent appointed in 1845. In 1846, all the Indians who wished to emigrate did so, the Government aiding the emigration and supplying rations after removal. The balance of the Indians made it manifest that they did not wish to go, and no further arrangements for emigration were made, but the covenants to pay money to persons who emigrated were performed as to such persons. Some years afterwards this court held that the Government should have required the Tonawanda Senecas to fulfill their contract for the sale of their reservation, and as, but for this failure, they might

have emigrated, the Government agreed to pay them the value of their share of the Western lands, so that they could buy permanent homes in New York instead. Ultimately the Government restored the unoccupied land which had been set apart after the treaty to the public domain. Then the Indians, under the leadership of a new generation of chiefs, and probably influenced by the action of the Government as regards the Tonawandas, fancied that they were wronged, and began to urge their claim. Finally the Government decided to secure a judicial decision as to the validity of the claim.

This course of action shows that the Government has never surrendered its legal right to keep the land which the Indians did not wish to occupy, nor ever acquiesced in the Indians' denial of that right, although it has wisely concluded that the only way to finally settle a controversy of this sort is in a court of law.

CHARLES C. BINNEY,
Special Attorney,
 L. A. PRADT,
Assistant Attorney-General,
for Appellee.





No. 106.

FILE
MAR 2
JAMES H. McK

Sup^r. Dy. of Atty. Gen^r. (C)
for Appellee - on rearg.
Filed Mar. 2, 1898.

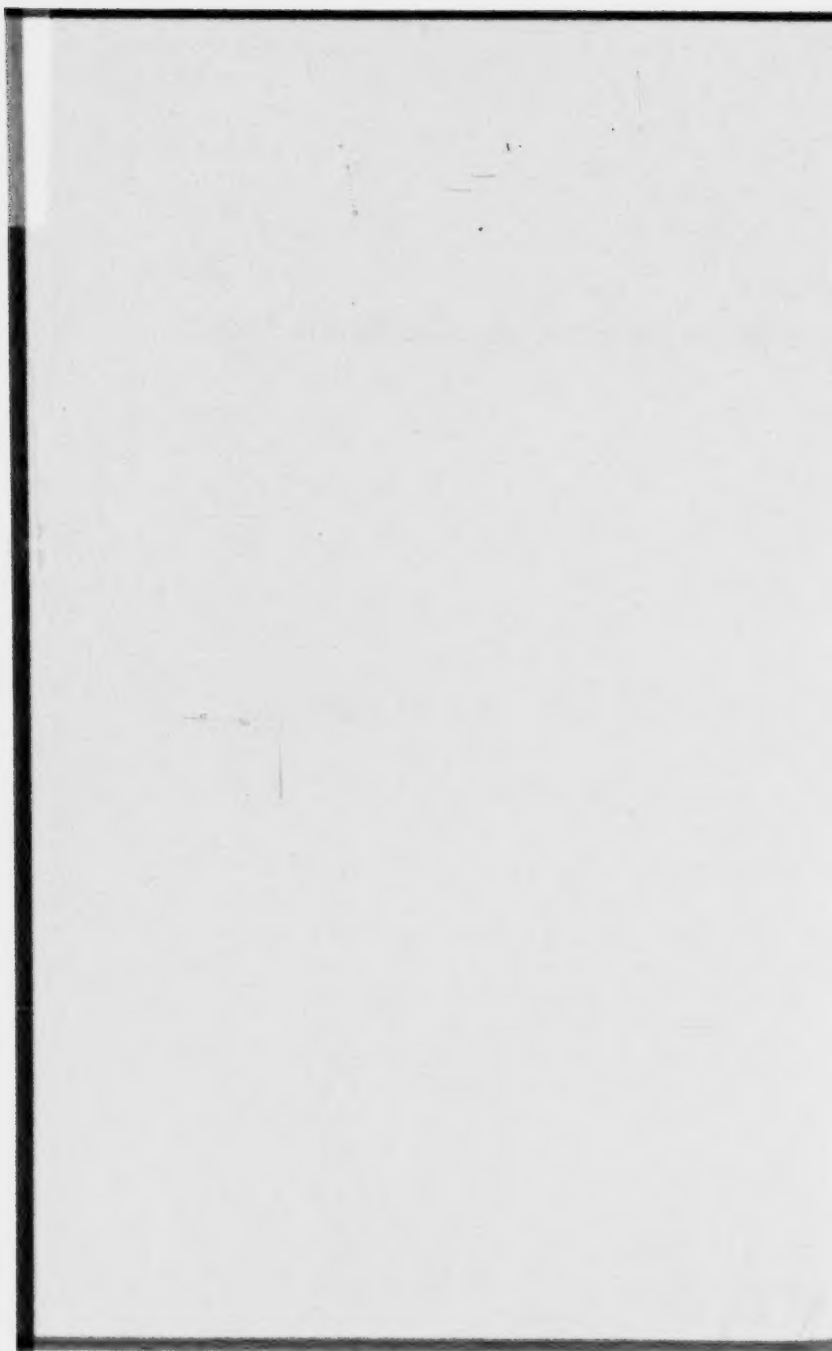
In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS, APPELLANTS, }
v. } No. 106.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENT TO APPELLEE'S BRIEF ON REARGUMENT.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

| | |
|-----------------------------------|------------|
| THE NEW YORK INDIANS, APPELLANTS, | } No. 106. |
| <i>v.</i>
THE UNITED STATES. | |

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENT TO APPELLEE'S BRIEF ON REARGUMENT.

Since the appellee's brief on reargument was written the appellants have filed a second additional brief on reargument, which requires notice as to a few points.

THE INTRODUCTION OF NEW MATTER NOT IN THE RECORD.

In the appellee's brief on reargument objection is made to the introduction of any new matter not in the record and not the subject of judicial notice. This objection is now renewed as regards Senate confidential Document B, Twenty-sixth Congress, first session, certain citations from the Senate Executive Journal, vol. 5, and

House Report No. 1858, Fifty-second Congress, first session, all of which it is now attempted to bring into the case, the first two as evidence that the Senate proviso of June 11, 1838, was not communicated to the Indians and the last as evidence that Congress believed that the United States had violated the treaty of Buffalo Creek.

It is submitted that the time for the *trial* of this case has passed, and that all that remains is for this court to decide the law of the case upon the facts as found by the court below. No *new evidence* can now be introduced.

It is conceded that the official publication of confidential Document B is the subject of judicial notice, so that had the appellants seen fit to put its contents in evidence in the court below, their genuineness would not have had to be proved; but that fact does not give the various papers contained in this document any higher evidentiary value than would belong to the same papers in unofficial form but duly proven, nor does it make them the subject of judicial notice any more in the one case than in the other. Even if this were otherwise, the whole document, and not merely a few extracts, would have to be laid before the court, by original or certified copy, when the court would be able to learn much as to the intense and permanent opposition of the Indians to removal, and would see clearly that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns were not parties to the treaty of Buffalo Creek, as ratified and proclaimed. More than this, the court would find evidence that the substance of the Senate proviso of June 11, 1838 (as to what should be done

with the surplus land and money in case of a partial emigration of the Indians), was made known to the Indians, as also that the same proviso was before the Senate in 1840, just before the final resolution of ratification, so that when the latter resolution (which was intended merely to supplement and not to repeal the resolution containing the proviso) was passed, the proviso must still have been regarded as valid and binding.

The reports of committees contained in the extracts from Senate Executive Journal, vol. 5, and in House Report No. 1858, Fifty-second Congress, first session, are objected to on the same ground, viz, that if they have any evidentiary value they should have been produced at the trial, for incorporation into the findings. Moreover, that portion of the latter report which the appellants wish to use (Second Addl. Brief, pp. 38-39) is merely the argument of a committee in support of a bill which did not pass. How such an argument can be received as evidence of the intention of Congress does not appear.

An illustration of the failure of counsel to distinguish between what is in the record and what is not, is found in the reference to Senate Miscellaneous Document No. 46, Fifty-second Congress, first session (containing the findings in the Congressional case), which is stated to be "set forth in the record" in this case. (2d Addl. Brief, p. 37.) It is in the appellant's additional brief, and the objection to it is that it is *not* in the record.

The second additional brief also states (p. 40) that the findings in the Congressional case are "in every material fact" the same as the findings upon which judgment

was entered in the court below. This statement is emphatically denied. The facts most vital to the defense did not appear in those earlier findings.

The proviso to the Senate resolution of 1838.

That this proviso was not physically part of the written treaty to which the assenting tribes gave their assent has never been denied, but that fact does not prove that the proviso was not made known to those tribes. It has already been shown that, as regards the rights of the Indians, this proviso was merely declaratory of the provisions of the treaty, properly understood. (Appellee's Brief on Rearg., p. 26.) There is, however, every indication, short of a positive statement, that it was fully made known to the Indians. (Appellee's Suppl. Brief, p. 16.)

The object and purpose of the parties.

Appellants' counsel state that "the object and purpose of the Indians" in making the treaty was "to secure a 'permanent and peaceful home' west of the Mississippi." (2d Addl. Brief, p. 27.) Counsel are so convinced of the abiding determination of the Indians to emigrate that they omit from their quotation (at the foot of the page) from the preamble to the treaty certain important words which show that the treaty was merely tentative and that the opposition to emigration was well known. The words "by *bringing them to see and feel*, by his justice and liberality, that it is for their interest to do so [i. e., remove] without delay," are among the most important

words in the whole treaty in making plain its object and the circumstances under which it was made. Their omission, however inadvertent, from what purports to be a quotation from the preamble, is a serious defect in the argument based on such quotation.

Whether the treaty itself made a grant of the lands.

It is hardly an important question whether or not a grant was made by the treaty itself, or was to be made in the future, when the patents issued, because if there was a grant it was only in favor of the Indians who desired to remove, and the record shows that all these Indians did so, while the estate granted was on the condition precedent of removal to the land within a certain specified time. Appellants' counsel cite the words of grant contained in several other Indian treaties, to show, apparently, that such language is the equivalent of that used in the Buffalo Creek treaty. (2d Addl. Brief, p. 31.) It is enough to point to the fact that not one of these treaties use the words "set apart," but all of them use such words as "convey," "give," "grant," or "cede."

The appellants contend (2d Addl. Brief, p. 16) that the sale of the Seneca reservations to Ogden and Fellows in 1838 proves "that the Indians understood and believed that on the ratification of the treaty they secured *a vested right and estate* in the Kansas lands," the idea evidently being that the Indians would never have sold those lands unless at the same moment that the sale became binding they should have become possessed of a present vested estate in other lands. This

contention assumes greater legal knowledge and a more abundant care and caution on the part of the Indians than can properly be ascribed to them, or than the occasion demanded. They knew nothing of vested estates, but what they knew was that they secured a right to be removed to other lands, and that their vendees secured a right to call upon the Government to remove them to such other lands. They knew, too, that their vendees would exercise this latter right, so that their own removal to the West was certain, whether they wish to avail themselves of their right to be removed or not. This knowledge sufficed them, and it sufficed to make them earnestly resist all suggestions of removal until 1842, when the arrangements were changed, and they reacquired the right to stay in New York.

The next contention (2d Addl. Brief, p. 17) is that the proviso in section 3 of the act May 28, 1830 (4 Stats., 412), in conformity with which the patent was to issue, "implies that a title had vested in the Indians." Undoubtedly when an exchange of lands was effected under that act the title vested, but the only effect of the proviso was to declare that in spite of the guaranty and the patent provided for by the act, the Indians should have no absolute estate in the land, but only a right of occupancy, which would terminate on their abandonment or becoming extinct. Moreover, the present case does not involve any exchange under the act of 1830, and the only connection of that act with the case is that it was provided that when the patent or patents issued (which could not be until the emigration had taken place, and the extent

of the territory occupied, and to be covered by the patents, was known) they should conform to the third section.

In regard to the authorities cited as to the effect of legislative grants, it should be noted that *Schulenberg v. Harriman* (21 Wall., 44) involved a statute with specific words of grant, while *United States v. Brooks* (10 How., 442) and *Doc v. Wilson* (23 How., 457) were cases where lands were excepted from the operation of treaties. In *United States v. Brooks* the Caddoes had granted certain land to François Grappe and his sons by "deed of gift" in 1801, before the cession of Louisiana, and the treaty of 1835, ceding the Caddo lands to the United States, recited this grant and provided that the Grappes should have their right to the land reserved to them in fee. (7 Stats., 472-473.) This was an unconditional confirmation of the Caddo deed of gift, and as complete an assurance as an original grant from the United States would have been. That case bears no resemblance to the mere setting apart of lands, grants of which could subsequently be made in case the contemplated grantees chose to remove to the lands so set apart.

In *Doc v. Wilson* the Pottawatomies had ceded certain lands to the United States, and by the same treaty the United States agreed "to grant" certain specified quantities of the ceded lands to certain Indians of the tribe individually. The court held that in such a case the Indian title by occupancy was simply reserved from the operation of the treaty so that "the reserves took by the treaty, directly from the [Pottawatomic] nation, the

Indian title * * * to which the United States title was either added or promised to be added." The Indian title was alienable, the treaty not prohibiting its sale, and hence when the lands were surveyed and selections were made for these individual grants, an alienee would have all the rights that his alienor would have had had he retained his title. Such a case bears as little resemblance to the present as does that of *United States v. Brooks*.

Appellants' counsel point out that the original fifth article, struck out by the Senate (Rec., 13), uses the words "the foregoing grant," and they cite *Ex parte Crow Dog* (109 U. S., 556) as authority for construing the treaty in the light of those words. That case, however, referred to parts of a statute which had been law, but had subsequently been repealed, whereas the words quoted were struck out before the treaty was adopted, and hence never made part of the law of the land at all. They do not, therefore, express any intention or opinion of the treaty-making branch of the Government, and all that their presence in the record shows is that the Senate never sanctioned the use of such words.

The effect of the Tonawanda treaty.

Appellants' counsel contend (2d Addl. Brief, p. 42) that the Tonawanda treaty of 1857 constitutes such a construction of the treaty of 1838, as to all the parties thereto, as to bring the case within the rule of *Foster and Elam v. Neilson* (2 Pet., 253, 307). The argument is that the Tonawanda treaty recognized a then existing *right* of

the Tonawandas to the Kansas lands, and to be removed thither, and that all the other parties to the treaty of 1838 had the same rights. Turning to the Tonawanda treaty, however (11 Stats., 735), it is found to contain a recital that the Tonawandas *had* had such rights, but it is silent as to whether their rights still existed or not, while the words, "the United States are willing to exercise the liberal policy which has heretofore been exercised in regard to the Senecas, and for the purpose of relieving the Tonawandas of the difficulties and troubles under which they labor," indicate that the treaty was recognized as a matter of grace on the part of the United States rather than of right. That the Tonawandas, in spite of their opposition to the wishes of the Government, had, from the peculiar circumstances of their case, certain legal rights which the other Indians had not, has already been shown. (Appellee's Brief, p. 78.) These peculiar rights were enough to warrant the treaty, if its language be held to recognize a right, without involving the conclusion that the other Indians were entitled to be provided for in the same way that the Tonawandas were.

It is submitted, however, that the case of *Foster and Elam v. Neilson* only applies where the course of the political branch of the Government has been "a plain one," to use the words of Marshall, C. J.; i. e., a consistent and undeviating course. Even if the Government believed in 1857 that the Tonawandas had rights under the treaty of 1838, its subsequent refusal for nearly thirty years to accede to the demands of the other New York Indians, in spite of constant agitation of

their claims, and its ultimate reference of the matter to the Court of Claims, first, for a decision on the facts, and again for a judicial determination upon the facts reported or other evidence, show conclusively that it has never looked upon the rest of the New York Indians as it did upon the Tuscaroras. To hold that because a treaty has once been made with certain Indians, recognizing their rights under a previous treaty, a judicial determination of the rights of other parties to the same previous treaty is impossible, in spite of the express desire of Congress to have such a determination, is an elevation of treaty-making power above the legislative and judicial, for which no warrant is found in the Constitution.

CHARLES C. BINNEY,

Special Attorney,

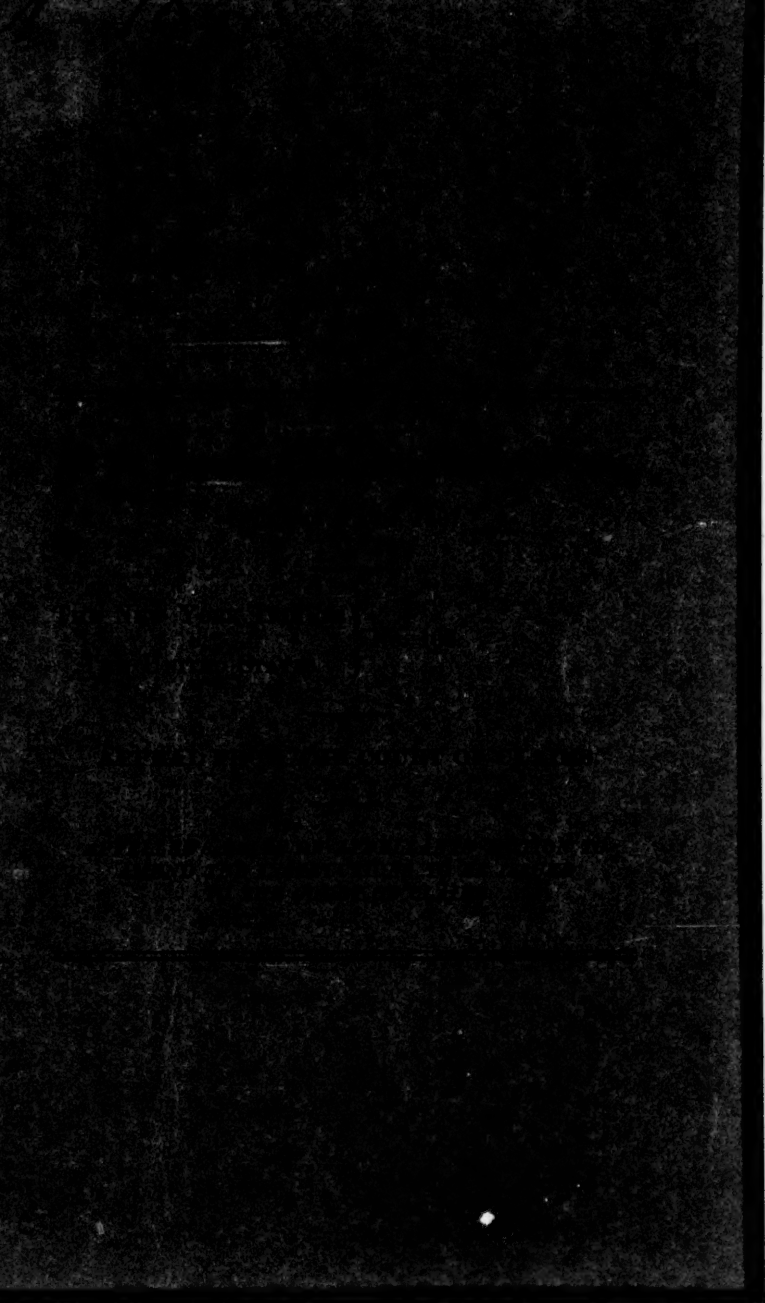
L. A. PRADT,

Assistant Attorney-General,

for Appellee.







In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS }
v. } No. 106.
 THE UNITED STATES. }

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF ON APPELLANTS' MOTION TO
AMEND THE INSTRUCTIONS TO BE ISSUED
TO THE COURT OF CLAIMS.

The appellants' motion, though couched in the form of a motion to amend the instructions contained in the judgment of the court, goes far beyond this in reality, as the court intimated when the motion was made. It seeks a reconsideration by the court of certain points in the case, and even a consideration of certain jurisdictional questions which were not, strictly speaking, before the court at all at the arguments, because, as the record stood, they could not be made the subject of assignments of error, the court below having decided them in the appellants' favor, while as the judgment was in favor of the appellee.

upon the whole case no cross appeal could be taken. Now that the judgment has been reversed, these questions necessarily affect the new judgment to be entered in the court below, and they must arise in this court if it decides to give precise instructions to the court below as to the new judgment to be entered rather than to direct in general terms that a judgment be entered upon the facts appearing in the court below as controlled by the law laid down by this court. The motion, therefore, whatever its form, is in substance a motion for what is properly the subject of a reargument, and even in part a new argument upon new questions.

The appellants' motion covers two points: First, the liability of the United States for the land not sold, but "otherwise disposed of," as distinguished from the land actually sold; and second, the parties to whom the United States is liable, and the extent of this liability to each of such parties.

As to the first point, it may be conceded that, under the law as laid down by this court, there is no reason for restricting the liability of the United States, as appellants' counsel claim the judgment of this court does restrict it, to "the net amount actually received by the Government for the Kansas lands," it being a fact of record in the court below (though not in this court) that such amount is much less than the deduction which the judgment requires on account of the settlement with the Tonawandas. The doctrine of this court's opinion requires that the United States be held liable for the lands "otherwise disposed of" as well as for those actually sold. As to the amount so allowed for the former, how-

ever, it can not be assumed without evidence that the lands given away would, if sold, have realized as much as the lands actually sold, or that the judgment should be, as the appellants propose, for the value of the whole tract, based on the net price obtained for such portion of it as was sold. It is much more likely that if part of this land had not been given away, as it was, for internal improvements, the whole tract could not have been sold, or not on as favorable terms as were obtained for the small portion actually sold. The judgment to be entered by the court below, therefore, should be for the net amount received for the land sold, and the net amount which the court below may find could have been obtained for the land otherwise disposed of, if it had all been sold as public land, less the amount paid the Tonawandas for their interest in the land, and other just deductions.

In the second point of the motion the appellants seek to commit this court to the position that all the parties claimant in this suit were parties to the treaty of Buffalo Creek and entitled to a judgment—a position not merely unwarranted by anything stated in the opinion of this court in this case, but even to some extent at variance with that opinion, the court holding that, under the amended treaty, the Kansas lands were intended for the tribes then in the State of New York, whereas four of the parties claimant are tribes who had left New York some years before and were then in Wisconsin.

This court is now asked to instruct the Court of Claims “to enter judgment for the claimants for an amount to be represented by the 1,824,000 acres of land mentioned in the treaty,” at a certain rate, less certain specific deduc-

tions, which amount to 218,240 acres. The instruction therefore necessitates a judgment for an amount to be represented by precisely 1,605,760 acres, at the rate realized from such of the lands as were sold, this judgment to be entered in favor of "the claimants," i. e., *all* the claimants, to be divided among them presumably on the basis of schedule in the treaty, though this is not stated.

The judgment entered on April 11, 1898, covered an instruction to enter a judgment for "the net amount actually received by the Government for the Kansas lands" less a certain deduction of 208,000 acres "*and other just deductions.*" Conceding that the appellants should not be restricted to "the net amount actually received" (for then, after making the required deduction, they would get nothing), it is still submitted that the Court of Claims should not give judgment for an amount represented by all the lands, less only the acreage covered by the settlement with the Tonawandas (208,000 acres) and that actually allotted to certain Indians (10,240 acres), but that "other just deductions" should also be made.

The question then arises, What "other just deductions" should be made? It is submitted that the share of those tribes or bands who, although claimants in this case, were *not parties to the treaty* as ratified and proclaimed, constitutes a deduction which is not merely just, but is necessitated by the fact that the claims of those tribes or bands are not within the jurisdiction of the court below or of this court on appeal.

The jurisdictional act in this case (act of January 28, 1893, 27 Stats., 426) authorizes the Court of Claims and

this court to hear and adjudicate "the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, against the United States, growing out of the unexecuted stipulations of said treaty on the part of the United States."

It is clear beyond question that under this act neither the Court of Claims nor this court can have any jurisdiction over any claims of New York Indians, except such as were *parties* to the treaty of Buffalo Creek. The petition in this case states that the parties claimant are:

* * * the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, of the 15th day of January, A. D. 1838, viz, the New York Indians in the States of New York and Wisconsin, including the Seneca Nation and the Oneida, Onondaga, Tuscarora, Cayuga, St. Regis, Brothertown, Stockbridge, and Munsee tribes of Indians.

It is submitted on the part of the United States that, as a matter of fact, this enumeration of the Indians who were parties to the treaty of Buffalo Creek is incorrect, the only parties to that treaty being the following tribes of New York Indians, viz, the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis, and further that those tribes are entitled, under the treaty as construed by this court, to a judgment based upon their respective shares of the Kansas lands at the rate of 320 acres apiece, for each individual of these tribes, as their numbers were computed in the treaty.

The interest of each tribe in the land set apart.

The preamble to the treaty of Buffalo Creek states that it is "entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen, and warriors hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint."

The second article of the treaty declared that the United States agreed to set apart a certain tract of country situated directly west of the State of Missouri "as a permanent home for all the New York Indians now residing in the State of New York or in Wisconsin or elsewhere in the United States, who have no permanent homes," and the country to be set apart was described by certain boundaries and stated "to include 1,824,000 acres of land, being 320 acres for each soul of said Indians as their numbers are at present computed," the same article further stating that "it is understood and agreed that the above-described country is intended as a future home for the following tribes, to wit, the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and the Brothertowns residing in the State of New York and at Green Bay; and the same is to be divided equally among them according to their respective numbers as mentioned in the schedule hereunto annexed." The schedule annexed gave a census of the various tribes, the total population being 5,485, but this total is not stated in the schedule itself.

Article 7 of the treaty stated that the rejection by the President and Senate of any provisions applicable to one tribe or distinct branch of a tribe should not be construed to invalidate the treaty as to others, but that as to them it should be binding and remain in full force and effect.

The statement that the acreage to be set apart was 320 acres for each soul of said Indians as their numbers were then computed makes it clear that 320 acres for each individual was regarded as the proper quantity to be set apart for, and ultimately enjoyed by, the Indians, so that if their numbers had been greater a larger area would have been set apart, while if their numbers had been less the acreage set apart would have been smaller. There is, however, a patent inconsistency between the acreage which it is stated was to be set apart and the schedule of the census of the Indians. The acreage set apart gives precisely 320 acres apiece for 5,700 Indians, while the census shows that there were but 5,485 New York Indians, which would make the proper acreage, on the basis of 320 acres for each person, 1,755,200 acres—a difference of 68,800 acres.

Probably the area stated in article 2 was originally so stated under the impression that the actual number of New York Indians was 5,700, the party drawing up this article not having the schedule before him at the time; and, owing to the fact that the schedule gave the population of each tribe, but did not show the total population, the error in the first article remained undiscovered. The language of the article, however, stating that the acreage is "320 acres for each soul of said Indians, as their numbers are at present computed," makes the intention of

the parties so clear that the statement of the acreage as 1,824,000 acres should be corrected by the schedule, and the treaty should be understood as providing for the setting apart of 1,755,200 acres, and no more.

The provisions of the treaty further show that each of the respective tribes was to have a particular tract of land set apart for it, and these separate tribal tracts were of course to be of a size proportionate to the population of each tribe at the rate of 320 acres for each individual. This must be borne in mind in connection with the concluding words of the second article, stating that the country to be set apart was intended as a future home for the tribes named, the same "to be equally divided among them according to their respective numbers, as mentioned in the schedule hereunto annexed." Taken alone these words would indicate that the whole 1,824,000 acres (or 1,755,200 acres, if the census is to be regarded) were to be divided among the Indians in New York, without making any deduction for the exclusion of those in Wisconsin, but the familiar rule that all parts of a statute or treaty (for the rule must apply as much to a treaty as to any other part of the law of the land) must be construed together so as to harmonize forbids such a conclusion. This very article declared that the size of the tract depended on the population of the Indians as then computed, and hence the words "to be equally divided among them according to their respective numbers" must mean that if all the tribes mentioned became parties to the treaty, the country to be set apart was to be equally divided among them according to their respective numbers, but that if for any reason any of the tribes

either did not become parties to the treaty or subsequently withdrew from participation therein, the remaining tribes should have precisely what they would have been entitled to had all the tribes participated in the treaty and its benefits, and the withdrawal or nonparticipation of any tribe or tribes should not increase the acreage to be granted to the remaining tribes. The failure of any tribe to become a party to the treaty could not possibly affect the obligations of the United States to the other tribes nor the consideration which was to pass from those tribes to the United States, and there could be no possible reason for increasing the obligations of the United States toward any tribe or tribes merely because certain other independent tribe or tribes should have failed to become parties to the treaty.

Whatever alliance may have existed between these tribes or any of them, the treaty recognizes no such alliance, but deals with each tribe as a separate, independent body, and the terms of the seventh article, providing that a rejection of the provisions applicable to one tribe or branch of a tribe should not be construed to invalidate the treaty as to others, but as to them it should be binding and remain in full force and effect, show the intention that the treaty was to have precisely the same force as to those tribes as to which it remained in full force and effect as it would have had if its provisions had been applicable to all the tribes, and that no exclusion of any tribe from the operation of the treaty could either increase or diminish the value of the rights of the remaining tribes under the treaty.

Who the "parties to the treaty" were.

The treaty itself bears the signatures of the chiefs, headmen, and people of the Senecas, Cayugas, Onondas in New York, Onondas at Green Bay, St. Regis, Onondagas residing with the Senecas, and Cayugas, but no signatures in behalf of the Onondagas at Onondaga (a body shown by the schedule to be distinct from the Onondagas residing with the Senecas), nor of the Stockbridges, Munsees, and Brothertowns, and hence the four tribes last mentioned were not parties to the treaty, according to the terms of the preamble, which states that the treaty was entered into "between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen, and warriors are hereto subscribed." It is manifest that when the original treaty was executed only the tribes whose chiefs, headmen, and warriors signed the treaty were parties thereto, and that the Onondagas at Onondaga, Stockbridges, Munsees, and Brothertowns were not parties and could have no rights under the treaty unless they subsequently became parties.

The nonparticipation of the Onondagas at Onondaga is explained by the fact, stated in the record (p. 18), that they had officially declared that they would not remove; while the nonparticipation of the Stockbridges, Munsees, and Brothertowns was manifestly due to two facts: First, that they had no interest in the 500,000-acre tract at Green Bay, a portion of which was relinquished to the United States in the first article of the treaty, and, second, that other arrangements were about to be made with them.

The Menomonee treaty of October 27, 1832 (7 Stats., 405), expressly states more than once that the 500,000-acre tract was to be granted to "the Six Nations [i. e., Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and at one time the Mohawks. See Rec., p. 7.] and the St. Regis tribe of Indians," a description which does not include the Stockbridges, Munsees, and Brothertowns, who were provided for by the United States in a proviso to the Menomonee treaty of February 8, 1831 (7 Stats., 342, 347), as recited in the preamble of the treaty of October 27, 1832, the Stockbridges and Munsees receiving two townships, of 23,080 acres each, on the east side of Lake Winnebago, and the Brothertowns one similar township adjoining the others, all three tribes being compensated for their improvements on the land which they had formerly occupied in Wisconsin, and which they were required to abandon.

The preamble of the treaty of Buffalo Creek, in reciting the Menomonee treaties of 1831 and 1832, refers to the Green Bay lands as the "500,000 acres of land so secured to the New York Indians of the Six Nations and the St. Regis tribe," thus showing the construction put by both parties to this treaty upon those prior treaties.

While the treaty of Buffalo Creek (which, as already stated, had been signed by all the tribes of the New York Indians except the Onondagas at Onondaga, Stockbridges, Munsees, and Brothertowns) was before the Senate, a treaty with one of the signatory tribes or bands, viz, the Oneidas at Green Bay, was executed, ratified, and proclaimed before the Senate's first resolution of ratification of the Buffalo Creek treaty was adopted.

The Oneida treaty (7 Stats., 566) contains, on the part of the Oneidas at Green Bay, a cession of their share of the unoccupied part of the 500,000-acre tract, the same which these Indians, together with the other parties of the treaty of Buffalo Creek, had already agreed to cede to the United States; but the consideration for this cession was changed from what it had been in the treaty of Buffalo Creek, and instead of receiving an interest in the lands to be set apart west of the Mississippi, the Oneidas at Green Bay were to receive "in consideration of the cession contained in the first article of this treaty" \$33,500. This being the case, any further participation of the Oneidas at Green Bay in the treaty of Buffalo Creek was superfluous. These Indians had sold their rights in the unoccupied Wisconsin lands for cash, and they had no further interest therein which they could convey, or which could operate as a consideration for any promises by the United States.

Accordingly, the Senate struck out the nineteenth article, containing the special provisions for the Oneidas at Green Bay, and also the words "and at Green Bay" in the latter part of the second article, thus restricting the beneficiaries of the treaty, the tribes for whom the Kansas lands were intended as a future home, to the Indians residing in New York, as this court has recognized in the first paragraph of page 16 of the opinion. The excision of the words "and at Green Bay" also operated to exclude from participation in the benefits of the treaty the Stockbridges, Munsees, and Brothertowns, who lived in Wisconsin, as already stated, but as none of these tribes had signed the treaty, this action of the

Senate took from them no rights which they had previously possessed.

The Senate resolution of June 11, 1838, provided expressly:

That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it, until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each one of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said bands or tribes, when consulted as aforesaid, shall freely assent to said treaty, as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although one or others of said bands or tribes may not give their assent, *and thereby cease to be parties thereto.*

After the assents of certain tribes had been obtained, the treaty was again referred to the Senate by the President on January 22, 1839, and was returned to the President March 2, 1839, with the resolution that whenever he should be satisfied that the assent of the Senecas had been given, in accordance with the above resolution, he should make proclamation of the treaty. On January 14, 1840, the President again returned the treaty to the Senate, with certain documents, all of which are printed, together with the message, in a document entitled, "Confidential B, Twenty-sixth Congress, first session. Message from the President of the United

States, transmitting the amended treaty with the New York Indians, and certain documents relating thereto." This confidential document (a copy of which is in the possession of the Secretary of the Senate) was referred to by the appellants' counsel in their Second Additional Brief on Reargument, beginning on page 5. It was objected to by the counsel for the United States as outside the record, and not the subject of judicial notice, but it appearing that the court has overruled this objection and treated the document as properly the subject of judicial notice (Opinion, p. 19), counsel for the United States now refer to it in order to show what information was before the Senate when it adopted the final resolution of ratification, March 25, 1840, and it is submitted that the statements contained in this document are most important, as showing precisely what tribes or bands the Senate had in mind when it used the expression "The Six Nations of New York Indians," and the further expression, "said tribes, the Seneca tribe included."

The document called No. 3, beginning on page 29 of Confidential Document B, is the report of R. H. Gillet, the commissioner of the United States who negotiated the treaty of Buffalo Creek with the New York Indians, and who was afterwards employed to obtain from the several tribes the assents required by the Senate's resolution of June 11, 1838. The material portions of this report are as follows:

WASHINGTON, *October 25, 1838.*

SIR: In pursuance of the instructions of your Bureau to me, under date of July 9, 1838, I have submitted to the several tribes of the New York

Indians the treaty concluded at Buffalo Creek on the 15th day of January last, together with the amendment proposed by the Senate of the United States in the resolution of ratification of the 11th of June last. I now hand you a copy of the amended treaty, with the assent of the several tribes in writing. At the time of making the submission I fully and fairly explained the treaty and amendments to each tribe assembled in public council, according to the letter and spirit of the resolution of the Senate. I have now the honor to report to you the result of my labors with each of the several tribes.

Oncidas in New York.

On the 9th of August last I met this tribe in full council. [Then follows a statement in regard to the declaration of assent of this tribe, which is annexed to the treaty, 7 Stats., 562.]

Oncidas at Green Bay.

This portion of the tribe signed the treaty at Buffalo Creek and were parties to it. The letter of the Senate resolution appeared to me to require that the treaty and amendments should be submitted to this tribe; but another treaty having been made with them and ratified by the Senate, I thought it proper to ask special instruction from your bureau as to the propriety of the submission. My letter of the 16th of August last contains my views on this subject, and the letter from your office of the 22d of that month contains the instructions by which I was governed. These letters are, of course, to be found in your office. In consequence of the instructions received, *I did not make the submission to this tribe.*

* * * * *

The Tuscaroras.

On the 14th of August last, I met the Tuscaroras assembled in full council. [Here follows a statement as to the assent of the Tuscaroras, which is annexed to the treaty, 7 Stats., 563.]

Onondagas residing on Seneca reservations.

On the 22d of September last I caused a notice from the subagent to be served on the Onondagas residing on the Seneca reservations, requiring them to meet in council to receive a communication from me. [Then follows a statement in regard to the assent of these Onondagas, annexed to the treaty, 7 Stats., 564.]

The Cayugas.

This tribe is reduced in number to 130 souls.
 * * * On the 22d of September last a notice was served on them. [Then follows a statement as to the assent of the Cayugas, which is annexed to the treaty, 7 Stats., 563.]

Onondagas at Onondaga.

This portion of the Onondaga tribe was not present at the council at Buffalo Creek last winter, and consequently were not parties to the treaty. Lands were, however, provided for them in it at the West should they subsequently assent to the treaty. I was informed that various misrepresentations had been made to them concerning the treaty, and that unless they were corrected it would result in their sending a delegation to Washington to make inquiries on the subject. I deemed it proper to convene them in council and make the necessary explanations, and

relieve them from their fears. This I did on the 17th instant. My explanations had the effect I contemplated. Several expressed their desire to explore the new country at the West, saying, if it answered my description of it, many young men would remove there. This tribe was not represented in the exploring party sent out in 1837. I think it proper they should be permitted to see the country for themselves, and incline to the opinion that it would lead to their eventual removal to that country.

American Party of the St. Regis.

On the 9th of October last, I convened this tribe in council on their reservation in the State of New York. [Then follows a statement in regard to the assent of the St. Regis, annexed to the treaty, 7 Stats., 564.]

The Senecas.

[All the remaining portion of this report is devoted to a statement of the circumstances attending the assent given by the Senecas, which is annexed to the treaty, 7 Stats., 561, and of the disputes in regard to the validity of this assent.]

R. H. GILLET.

To the Commissioner of Indian Affairs.

The above report clearly shows precisely what tribes assented to the amended treaty and became parties thereto within the letter and spirit of the Senate resolution of June 11, 1838. They were the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis. The words "American party

of the St. Regis" are not used to distinguish the assenting Indians from any others in New York, but from that branch of the tribe which lived a short distance across the border in Canada.

Document No. 5, beginning on page 65 of Confidential Document B, is the report, dated October 29, 1838, from the Commissioner of Indian Affairs to the Secretary of War in regard to the assents of the various tribes to the amended treaty, and transmitting Gillet's report. It contains the following statement in regard to the Oneidas at Green Bay :

The amended treaty was not submitted to the Oneidas at Green Bay, although they signed the original one made at Buffalo Creek. The resolution of the Senate might be thought in spirit to embrace them; but the instructions to the Commissioner dispensed with any application to them, and, I think, rightfully. A treaty was concluded at Washington on the 3d of February, and ratified by the Senate on the 17th of May, 1838, with the First Christian and Orchard parties of Oneida Indians residing at Green Bay, superseding the nineteenth article of the original treaty of Buffalo Creek, which the Senate struck out for that reason, *leaving to these parties no interest or participation in the amended treaty.*

These two reports, Nos. 3 and 5, are the only portions of Confidential Document B which refer to the assents of any of the tribes other than the Senecas, the validity of whose assent was disputed, and with the question of which validity the document itself is chiefly concerned.

When the Senate was considering for the last time the treaty of Buffalo Creek, in consequence of the Presi-

dent's message of January 14, 1840, it had also before it a treaty made with the Stockbridges and Munsees on September 3, 1839, and referred to the Senate by the President December 12, 1839. (5 Sen. Ex. Jour., 223.) This treaty was made "between the United States and the Stockbridge and Munsee tribes of Indians (formerly of New York)," and provides for the sale of a portion of their land on the east side of Lake Winnebago, and the emigration of such members of the tribe as desired to emigrate, but this emigration was not to be to the land promised in the treaty of Buffalo Creek to be set apart for these tribes as well as the others of the New York Indians, but to such country as should afterwards be selected in the West by an exploring party, which was provided for in article 6. (7 Stats., 580.)

The affairs of the Brothertowns had already been dealt with by the Senate in the previous year when it passed the bill which became the act of March 3, 1839 (5 Stats., 349). This statute provided for dividing the lands of the Brothertown tribe in severalty and for admitting the members of that tribe to citizenship. With Confidential Document B, the Oneida treaty of 1838, the Stockbridge and Munsee treaty of 1839, and the act of March 3, 1839, before them, the Senate can not but have been aware that the Onondagas at Onondaga, the Stockbridges, Munsees, and Brothertowns had never been parties to the treaty of Buffalo Creek at all, either in its original form or as amended by the Senate, and that the Oneidas at Green Bay, though parties to the original treaty, were not parties to the treaty as amended; and further, the Senate must have been aware of the

precise reasons why each one of these tribes had failed to be a party to the treaty. When, therefore, the Senate resolved on March 25, 1840, "that in the opinion of the Senate, the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation," it is manifest that the words "the Six Nations of New York Indians" were used merely as a general description of the parties with whom the treaty had been made, and not as a positive assertion that the treaty had been made with every one of the tribes comprising the Six Nations, the treaty, as already stated, having been made with the individual tribes, and not with any confederation or aggregation of them. It follows, also, that the words "have been acceded to and approved by said tribes, the Seneca tribe included," did not mean that the treaty had been acceded to and approved of by every tribe belonging to the group known as the Six Nations, but simply that the assents of all of the assenting tribes, the Seneca tribe included, were satisfactory. In point of fact, the first finding in this case states that the Six Nations were the Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras, and Mohawks, but that the Mohawks had removed to Canada. The St. Regis were not a portion of the Six Nations, although a party to this treaty both in its original and amended form. If, therefore, the term "Six

Nations" had been used with exactness, it would have excluded the St. Regis, a result which the Senate certainly did not intend.

It follows from the above review of the facts in regard to the execution of this treaty and the assent to it as amended, that the words in the jurisdictional act, "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek New York, on the 15th of January, 1838," refer to the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras and St. Regis, *and no others*, and that this court has no jurisdiction to order a judgment to be entered in favor of any other parties.

The error of the court below.

The document "Confidential B" was, as appellants' counsel have stated (Second Additional Brief on Reorganization, p. 4, note), not brought to the attention of the court below, and consequently that court was not informed that the Senate, when it adopted the resolution of March 25, 1840, knew perfectly well that only the Senecas, Cayugas, Onondagas residing with the Senecas, Oneidas in New York, Tuscaroras, and St. Regis were parties to the treaty as amended. It is clearly due to this lack of information on the part of the court below that that court has decided that—

The Indians described in the jurisdictional act, sending this case to this court as "The New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th

of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca Reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca Reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca Reservation, Oneidas, St. Regis, St. Regis in New York, The American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.* (Rec., p. 7.)

The above must not be understood as committing the Court of Claims to the proposition that each of the above names refers to a separate tribe or band, it being obvious that many of them describe the same tribe or band, but the substance of the statement is that the court below has decided as a matter of law that the proper parties claimant in this case, under the jurisdictional act, are the Senecas, Cayugas, Onondagas residing with the Senecas, Onondagas at Onondaga, Oneidas in New York, Oneidas at Green Bay, Tuscaroras, St. Regis, Stockbridges, Munsees, and Brothertowns, they having all been, in the opinion of the court, parties to the treaty both in its original and amended form. This decision appears among the findings of fact, but it is really a conclusion of law, and the reason for it appears on page 31 of the record.

* When the same question was before the Court of Claims under the Bowman Act, it reported the fact to be that there was no evidence before the court that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns ever assented to the treaty as amended by the Senate June 11, 1838. (Sen. Mis. Doc. No. 46, Fifty-second Congress, first session, Finding IX.)

After a statement of the various assents to the amended treaty actually annexed thereto the court goes on to say:

The date of the acceptance of the treaty as amended by the Senate June 11, 1838, by the following tribes: Onondagas at Onondaga, Oneidas at Green Bay; Stockbridges, Munsees, Brothertowns, does not appear, but the court is of opinion, and so holds, that they did accept, and this for the following reasons:

The Senate, after the treaty had been sent to them, resolved that it be ratified, provided, among other things, that the ratification have no effect until the treaty with the Senate amendments be submitted and explained to each of the tribes or bands separately, and they have given their free and voluntary consent thereto; that as to those assenting the treaty take effect; as to the others, they should cease to be parties to it, and the President should thereupon make a proportionate reduction from the \$400,000 fund and the quantity of land provided for west of the Mississippi. Later, when the treaty was again before the Senate, a resolution was passed which in substance provided that when the President should be "satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty" with the New York Indians according to the first resolution, then the President might proclaim the treaty and carry it into effect. It is apparent at this point that, except the Senecas, all the New York Indians, in the Senate's opinion, had assented to the amended treaty. This second resolution was adopted March 2, 1839. A year later (March 25, 1840) the Senate passed this resolution:

"That in the opinion of the Senate the treaty between the United States and the Six Nations of

the New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation."

Thereupon followed the President's proclamation, wherein we find the following recitals:

"Whereas a treaty was made and concluded at Buffalo * * * by * * * a commissioner on the part of the United States and the chiefs, head men, and warriors of the several tribes of New York Indians assembled in council; and whereas the Senate did * * * advise and consent to the ratification of said treaty with certain amendments; * * * and whereas the Senate did [pass the resolution of March 25, 1840 (*supra*): Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do [pursuant to the two Senate resolutions (*supra*)] accept, ratify, and confirm said treaty, and every article and clause thereof, * * * [dated April 4, 1840]."

It therefore appears that the question of assent on the part of all the parties was maturely considered by the treaty-making power at the time, and that power in both its branches was convinced, and so decided, that all the New York Indians have assented to the treaty as amended. Behind that authoritative decision we are not disposed to look, even if we have the power to do so.

Undoubtedly it does appear that the question of assent *on the part of all the assenting parties* was "maturely considered by the treaty-making power at the time, and

that power in both its branches was convinced, and so decided," that all the assents that were given were valid and binding, but in view of the document, treaties, and statute which the Senate had before them the conclusion of the Court of Claims that the President and Senate decided that the other tribes, whose assents were not annexed to the treaty, were equally parties thereto, can not possibly be sustained.

The average to which the parties to the treaty were entitled.

According to the schedule contained in the treaty (giving the census of all the tribes of the New York Indians, both those in Wisconsin and those in New York), which schedule was stated in the second article to afford the basis upon which the size of the tract of land to be set apart was calculated, the population of the tribes who were parties to the treaty of Buffalo Creek as amended was as follows:

| | |
|---------------------------------------|-------|
| Senecas | 2,309 |
| Onondagas residing with Senecas | 194 |
| Cayugas..... | 130 |
| Tuscaroras | 273 |
| Oneidas in New York | 620 |
| St. Regis | 350 |
| Total..... | 3,876 |

From this total should be deducted the 650 Tonawanda Senecas who received the value of their share under the treaty of November, 1857 (11 Stats., 735), and also the 32 Indians who actually received allotments of land. This leaves the total number of Indians entitled, as of the date of the treaty of Buffalo Creek, to receive land at 320

acres apiece, 3,194, and the acreage upon which a judgment in their favor should be based is 1,024,080 acres, and no more. In support of this conclusion it has been already shown above that the treaty did not contemplate an increase in the area of the tract to be assigned to any tribe in consequence of a failure on the part of any other tribe or tribes to become parties to the treaty and entitled to receive a share of the land. This is not merely manifest from the language of the treaty itself, but from the understanding of the parties, as shown in the Tonawanda treaty of November 5, 1857. The court below has found as a fact that the sum of \$256,000 paid and invested for the Tonawandas under that treaty "was equivalent to \$1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to part of the sum of \$400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty." (Rec., p. 21.) The Tonawandas, being 650 in number, were entitled to 208,000 acres of land, and hence the sum of \$256,000 was made up as follows:

| | |
|-------------------------------------|-----------|
| For share of land..... | \$208,000 |
| For share of fund of \$100,000..... | 48,000 |
| Total..... | 256,000 |

The correctness of this computation is admitted by the appellants in their petition. (Rec., p. 5.) Had it been the understanding of the parties that the Indians who were parties to the treaty were entitled to the whole tract of 1,824,000 acres, even though some of the tribes that were named in the treaty as possible beneficiaries never

became parties thereto, it is obvious that a different computation would have been made in the case of the Tonawandas, and that they would not have been restricted to 320 acres apiece.

The same understanding is shown in the act of November 19, 1873 (17 Stats., 466), which provided for giving to the Indians who actually emigrated and remained on the land 320 acres apiece, and no more.

It is further submitted that the acreage upon which a judgment should be based should be affected by another "just deduction" to the extent of 56,320 acres, being 320 acres for each of the 176 Indians who were removed to the land at the cost of the United States in 1846, but who either died or returned to New York before any allotments were made to them. In the absence of evidence that their death or abandonment of the country to which they had been removed were due to any act or neglect of the United States, it is obvious that their rights lapsed with their death, or ceased from their abandonment of the land.

Making this deduction, the acreage upon which judgment should be based is 965,760 acres, the amount of the judgment to be divided among the tribes who were parties to the treaty in proportion to their numbers as given in the treaty, allowing in each case for the deductions made as above submitted.

CHARLES C. BISNEY,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.
PROPERTY OF
UNITED STATES SENATE
COMMITTEE COPY

NEW YORK INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 106. Argued March 2, 3, 1898. — Decided April 11, 1898.

The provision in the treaty of June 15, 1838, with the New York Indians, that the United States will set apart as a permanent home for them the tract therein described in what afterwards became the State of Kansas, was intended to invest a present legal title thereto in the Indians, which title has not been forfeited and has not been reinvested in the United States; and the Indians are not estopped from claiming the benefit of such reservation.

It appears by the records of the proceedings of the Senate that several amendments were there made to said treaty, including a new article; that the ratification was made subject to a proviso, the text of which is stated in the opinion of the court; and that in the official publication of the treaty, and in the President's proclamation announcing it, all the amendments except said proviso were published as part of the treaty, and it was certified that "the treaty, as so amended, is word for word as follows," omitting the proviso. *Held*, that it is difficult to see how the proviso can be regarded as part of the treaty, or as limiting at all the terms of the grant.

THIS was a petition by the Indians who were parties to the treaty of Buffalo Creek, New York, on January 15, 1838, 7 Stat. 550, to enforce an alleged liability of the United States for

Statement of the Case.

the value of certain lands in Kansas, set apart for these Indians, and subsequently sold by the United States, as well as for certain amounts of money agreed to be paid upon their removal.

These claims were referred, under the act of March 3, 1883, known as the "Bowman Act," to the Court of Claims. That court reported its findings to the Senate, January 16, 1892, and thereupon, on January 28, 1893, Congress passed an act to authorize the Court of Claims to hear and determine these claims and to enter up judgment as if it had original jurisdiction of the case without regard to the statute of limitations. There was a further provision, that from any judgment rendered by that court, either party might appeal to the Supreme Court of the United States.

The petition, which was filed on February 10, 1893, set forth as the substance of the treaty that the claimants ceded and relinquished to the United States all their right, title and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States, in and by the said treaty, agreed and guaranteed as follows :

First. To set aside, as a permanent home for all of the claimants, a certain tract of country west of the Mississippi River, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in a certain schedule annexed to the said treaty, and designated as Schedule A, upon condition that such of the claimants as should not accept, and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Statement of the Case.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal west, the following sums respectively, namely: To the St. Regis tribe, five thousand dollars (\$5000); to the Seneca nation, the income annually of one hundred thousand dollars (\$100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, twenty-five hundred dollars (\$2500) in cash, and the annual income of twenty-five hundred dollars (\$2500); to the Onondagas, two thousand dollars (\$2000) in cash, and the annual income of twenty-five hundred dollars (\$2500); to the Oneidas, six thousand dollars (\$6000) in cash, and to the Tuscaroras, three thousand dollars (\$3000).

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars, (\$400,000) to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired, but were exempted from obligation so to do.

The treaty of Buffalo Creek having been duly assented to by all the parties thereto, was afterwards on, to wit, the 4th day of April, A.D. 1840, duly proclaimed; and certain disputes thereunder having arisen, it was afterwards modified in some particulars not having reference to the matter of this claim, and as so modified was again proclaimed on, to wit, the 26th day of August, 1842.

The petition further alleged that at the time of the making

Statement of the Case.

of the treaty of Buffalo Creek aforesaid, and for many years prior thereto, the claimants owned and occupied valuable tracts of land in the State of New York, and had improved and cultivated the same and resided thereon, and from the products thereof chiefly sustained themselves.

That the President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, and no provision of any kind was ever made for the actual removal of more than about two hundred and sixty individuals of the claimant tribes, as contemplated by the said treaty; and of this number only thirty-two ever received patents or certificates of allotment of any of the lands mentioned in the first article of the said treaty, and the land allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

That after the conclusion of the said treaty of Buffalo Creek the United States surveyed and made part of the public domain the lands at Green Bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

That the lands west of the Mississippi River, secured to the claimants by the said treaty of Buffalo Creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation, and so remained until in, or about the year A.D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the State of Kansas. The said lands at the time the same were so appropriated by the United States were of great value, to wit, of the value of one dollar and twenty-five cents (\$1.25) per acre and upwards.

That the action of the United States in appropriating the said lands as aforesaid was in pursuance of the proclamations of the President, of date December 3 and 17, 1860, and grew

Statement of the Case.

out of an order of the Secretary of the Interior of the 21st day of March, A.D. 1859; and between the said last-mentioned date and the proclamation of the said lands aforesaid the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted said claim in the premises.

That of the sum of \$400,000, agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes aforesaid, only the sum of \$20,477.50 was ever so appropriated, except as hereinafter stated, and of this sum only \$9464.08 was actually expended.

The petition further alleged that the Tonawanda band had been paid \$256,000 for their interest in the land; that settlement had also been had with the Senecas, and that a special act had been passed authorizing the Court of Claims to find the facts and enter up judgment, without interest, and that the statute of limitations should not be pleaded as a bar to any recovery.

The petition concluded with a demand for a judgment for the value of the lands and for the amounts that were to be paid in cash.

The Court of Claims found the facts stated in the margin,¹

¹ FINDINGS OF FACT.

1. In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that State.

The court decide that the Indians described in the jurisdictional act sending this case to this court as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the

Statement of the Case.

together with others which are not deemed material to the consideration of the case, and also found as a conclusion of law from these facts that the petition should be dismissed, whereupon the claimants appealed to this court.

Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.

2. Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their Western brethren with the privilege of removing to and occupying the same without changing their existing relations and treaties with the government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendants aided some ten Indians, representing plaintiffs, in exploring certain parts of Wisconsin with a view to making arrangements with the Indians residing there for a portion of their country to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas and Oneida nations of New York Indians.

August 18, 1821, the Menominees and Winnebago nations, in consideration of \$2000, chiefly in goods, ceded, released and quitclaimed all their right, title and claim in certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

"The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge and Munsee nations, of the one part, and the Menominees and Winnebagoes of the other, is approved, with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge and Munsee nations are to be held by them in the same manner as they were previously held by the Menominees and Winnebagoes.

"February 19, 1822."

"JAMES MONROE.

The \$2000 above mentioned was thus paid: In goods, \$900 from the Stockbridges, \$400 from the Oneidas, \$200 from the Tuscaroras; in cash, \$500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

3. Permission to secure an extension of the cession in the preceding

Counsel for Appellants.

Mr. Joseph H. Choate for appellants. *Mr. Henry E. Davis, Mr. Guion Miller, Mr. George Barker, Mr. James B. Jenkins* and *Mr. Jonas H. McGowan* were with him on the brief.

finding recited was given by the Secretary of War, and thereafter, on September 23, 1822, the Menominees, in consideration of \$3000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined, (adjoining the above,) to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee nations, the releasees promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

"The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon Bay, Green Bay, Fox River; that part of the former purchase made by said tribes or nations of Indians of the Menominee and Winnebago Indians on the 8th of August, 1821, which lies south of Fox River and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon Bay, and no farther, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the government has assented, are to be held by them in the same manner as they were held by the Menominees previous to concluding and signing the foregoing instrument, and that the title which they have acquired is not to interfere in any manner whatever with the lands previously acquired or occupied by the government of the United States or its citizens."

October 27, 1823, the Secretary of War officially notified the releasees that the President distinctly wished them to understand that by this partial sanction he did not mean to interfere with, nor in any manner invalidate, their title to all the lands which they had thereby acquired, including those not confirmed by the government, but, on the contrary, he considered their title to every part of the country conveyed to them by the releasors as equally valid as against them; and that what they had done was with the full assent of the government.

Of the consideration above mentioned, \$1000 were paid by the Stockbridges and Munsees, while \$1000 were to be paid by the Oneidas, Tuscaroras and St. Regis in one year from September 23, 1822, and \$1000 in two years from that date. Of the two latter amounts \$1000 appears to have been paid by the United States out of the funds of the St. Regis about 1825, while \$950 were paid by the Brothertown tribe September 18, 1824. In consideration of which the releasees, by an agreement with the Brothertowns, under date of January 8, 1825, ceded to them a small separate tract by metes and bounds, and, after reserving to themselves, for each tribe of the releasees,

Opinion of the Court.

Mr. Charles C. Binney for appellees. *Mr. Assistant Attorney General Pradt* was on his brief.

MR. JUSTICE BROWN delivered the opinion of the court.

a similar tract from out the country purchased from the releasors, granted to the Brothertowns an equal, undivided part of all the remaining portion of said purchase. It does not appear whether the Oneidas and Tuscaroras paid any part of the above consideration.

4. The grants set forth in findings 2 and 3 include the lands subsequently ceded by the Menominees to the United States by the treaties of August 11, 1827, and February 8, 1831.

5. Thereafter some New York Indians, belonging to the Oneida, St. Regis, Stockbridge, Munsee and Brothertown tribes, removed to and took possession of the lands in Wisconsin.

Later, and after 1832, another small portion of the New York Indians removed to the Wisconsin or Green Bay lands.

March 14, 1840, the Senecas denied ownership of Wisconsin lands, stating that they determined to have no other home than that of their fathers where they then resided, and, in May and September following, in petitions to the President, the Senate and the House of Representatives, their council denied that they were parties to the treaty.

6. It does not appear that application was made by the tribes or bands, or any of them, to the government, for removal to the Kansas lands provided for in the Buffalo Creek treaty, except as hereafter appears in these findings.

It does not appear that any substantial number of Indians wished to go to Kansas other than those who made up the Hogeboom party (*infra*).

7. In the year 1838, at the time of the negotiation of the treaty of Buffalo Creek, the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras and the St. Regis each possessed a reservation of land in the State of New York on which members of the tribes resided, and the right of occupancy of which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca nation; this they did with the consent of the Senecas, and a portion of the Onondagas did the same.

(The eighth finding is immaterial.)

9. For many years prior to the treaty of Buffalo Creek (of 1838) these nations or tribes of Indians had improved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

The treaty of Buffalo Creek, as printed in the seventh volume of the Statutes at Large, contains a misprint on the third line of page 556. The word "Oneidas" is in the original treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation."

Opinion of the Court.

The facts in this case are somewhat complicated, but the real question involved is whether the cessions of the Kansas lands to these Indians ever took complete effect, or whether the failure, or rather the refusal, of the Indians to remove to

10. *Extract from Executive Journal of June 11, 1838.*

The Senate resumed as in Committee of the Whole the consideration of the treaty with the New York Indians, and the article supplemental thereto.

On motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the Committee on Indian Affairs, and determined in the affirmative, yeas 33.

* * * * *

No further amendments having been made, the treaty was reported to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo Creek, in the State of New York, the 15th day of January, in the year of our Lord 1838, by Ransom H. Gillett, a commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians, assembled in council, with the following amendments.

(Here follows a series of amendments striking out original articles 3, 4, 5, 6, 9 and 19, striking out particular words and clauses from other articles, inserting new article 15, and concluding as follows:)

Resolved, further, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, which was made at the council-house of St. Regis on the 13th day of February, 1838: *Provided, The chiefs and headmen of the St. Regis Indians, residing in New York, will in general council accept of and adopt the aforesaid treaty, as modified by the preceding resolution of ratification.*

Provided always, and be it further resolved, (two-thirds of the Senate present concurring,) That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others

Opinion of the Court.

the lands set apart for them within five years, worked *ipso facto*, under the third article of the treaty, a forfeiture of their interest.

1. So far as concerns the legal aspects of the case, it is

of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided, further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

The Senate proceeded, by unanimous consent, to the consideration of said resolutions.

On the question to agree thereto,

| | | | |
|---------------------------------------|---|------------|----|
| It was determined in the affirmative, | { | Yeas | 33 |
| | | Nays | 2 |

* * * * *

Ordered, that the secretary lay this resolution before the President of the United States.

* * * * *

Proclamation of the Treaty of Buffalo Creek.

Martin Van Buren, President of the United States of America, to all and singular to whom these presents shall come, Greeting:

Whereas a treaty was made and concluded at Buffalo, in the State of New York, on the fifteenth day of January, one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians, assembled in council;

And whereas the Senate did, by a resolution of the eleventh of June, one thousand eight hundred and thirty-eight, advise and consent to the ratification of said treaty with certain amendments, which treaty so amended is word for word as follows, to wit. . . .

And whereas the Senate did, on the 25th of March, one thousand eight hundred and forty, resolve "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation: "

Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the eleventh of June, one thousand eight hundred and thirty-eight, and twenty-fifth day of March, one thousand eight hundred and forty, accept, ratify and confirm said treaty, and every article and clause thereof.

In testimony whereof I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Opinion of the Court.

unnecessary to inquire whether the government received from the Indians an adequate consideration for its reservation to them of the lands in Kansas. The findings upon this point are in substance that some of the New York Indians, between

Done at this city of Washington this fourth day of April, one thousand eight hundred and forty, and of the Independence of the United States the sixty-third.

By the President:

[SEAL.]

M. VAN BUREN.

JOHN FORSYTH,

Secretary of State.

11. The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to this subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with them, and the Tuscaroras, continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the following allegations: (*a*) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes, and put in motion by an agent of the preëmption owners: (*b*) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified, the lands and improvements on the Buffalo Creek reservation in New York were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Alleghany reservations in New York.

12. Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo

Opinion of the Court.

1810 and 1816, with the permission of the President and with some actual aid from the government in making explorations, bought of the Menominee and Winnebago nations all their right, title and claim to about 500,000 acres of land in Wis-

Creek and as shown below. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the government to remove the said Indians to Kansas.

The sum of \$9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

It does not appear that any of the thirty-two Indians to whom allotments were made settled permanently in Kansas.

13. A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The commissioner also reported that he held an enrollment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as wishing to go.

14. The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wisconsin, contained 65,540 acres, all of which has been allotted in severalty and reserved for school purposes except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty. (9 Stat. L. 955; 11 Stat. L. 663, 679; 16 Stat. L. 404.) The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the

Opinion of the Court.

consin in consideration of \$2000, chiefly in goods. This purchase was made for the benefit of the Six Nations and the St. Regis, Stockbridge and Munsee tribes.

Under a similar permission given by the Secretary of War,

State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

15. Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as those of the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of said lands as were sold at the rate of \$1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about \$1.22 per acre.

16. By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of certain releases of claims under the treaties of 1838 and 1842, agreed to pay and invest, and did pay and invest, for said band the sum of \$256,000.

The sum of \$256,000 was equivalent to \$1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of \$400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

17. After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian reserve be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and

Opinion of the Court.

and on September 23, 1822, the Menominees, in consideration of \$3000 in goods, made a similar cession of another tract, containing about 5,000,000 acres, to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee nations. Both of these cessions were approved by the President. Thereafter, some of the New York Indians removed to and took possession of the lands in Wisconsin.

It seems, however, that the Menominees were dissatisfied with and repudiated the arrangement, and thereupon entered into two treaties with the United States, by the first of which (August 11, 1827, 7 Stat. 303) they agreed to refer the matter to the President, and by the second of which (February 8, 1831, 7 Stat. 342) protesting that they were under no obligations to recognize any claim of the New York Indians to any portion of their country, they agreed to set apart as a home for the several tribes of the New York Indians about 500,000 acres of land, for which the United States agreed to pay them \$20,000, to be applied to their use. By these treaties a large quantity of other lands was also ceded by the Menominees directly to the United States, three townships of which were set aside for the Stockbridges, Munsees and Brothertowns.

It sufficiently appears from this statement that the Indians were possessed of some sort of title or interest in a large quantity of lands in Wisconsin, which the government was desirous of acquiring, and for which it was willing to make a large cession in the then unnamed, almost unknown, and wholly unsettled Territory, which was subsequently admitted to the Union as the State of Kansas. The consideration was evidently treated as a valuable one, and whether adequate or not would have been sufficient to support a deed between pri-

allotments were made to them. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860,) some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

(The remaining findings are deemed to be immaterial.)

Opinion of the Court.

vate parties. Probably, however, the main inducement to the cession was the agreement of the Indians to remove beyond the Mississippi, and whether the agreement of the government to set apart for them a permanent home in this Territory was supported by any other consideration which would be deemed a valuable one between private parties, is wholly immaterial so far as the treaty obligations of the Government are concerned.

2. The first and one of the most important questions in the case turns upon the nature of the title acquired by the Indians under the treaty. Was it a grant *in præsentî*, or merely an agreement to set apart for the Indians at some future time the lands in question, provided that they would remove thither within the five years fixed by the third article of the treaty?

By the first article "the several tribes of New York Indians . . . hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay;" and by the second article "in consideration of the above cession and relinquishment, . . . the United States agree to set apart" a tract of country, containing 1,824,000 acres of land, described by metes and bounds, "as a permanent home for all the New York Indians, . . . to have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section" of the act of May 28, 1830, "with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other." By the third article "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years . . . shall forfeit all interest in the lands so set apart to the United States."

The proper construction to be placed upon similar clauses was the subject of consideration by this court in several cases before the railroad land grant cases, and the conclusion reached that if, from all the language of the statute or treaty,

Opinion of the Court.

it was apparent that Congress intended to convey an immediate interest, it will be construed as a grant *in presenti*.

In the case of *Rutherford v. Greene*, 2 Wheat. 196, 198, the State of North Carolina passed an act in 1782 "for the relief of the officers and soldiers in the continental line," and in the fifth section enacted that 25,000 acres of land "*shall be allotted for, and given to*, Major General Nathanael Greene, his heirs or assigns, within the bounds of the land reserved for the use of the army, to be laid off by the aforesaid commissioners;" and a further section (seventh) provided that the commissioners should "grant certificates to such persons as shall appear to them to have a right to the same." It was contended on the part of the appellant that these words gave nothing; that they were in the future and not in the present tense, and indicated an intention to give in future, but created no present obligation on the State nor present interest in General Greene. But it was held that, as the act was to be performed in future, the words directing it were necessarily in the future tense, and that, although the land was undefined, the survey afterwards made in pursuance of the act gave precision to the title and attached it to the land surveyed.

In reply to the argument that to make this an operative gift the words "are hereby given" should have been used, Mr. Chief Justice Marshall observed: "Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms used in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

This case was followed in *United States v. Brooks*, 10 How. 442, in which a treaty with the Caddo Indians provided that certain persons "*shall have their right* to the said four leagues of land reserved for them, and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles are supple-

Opinion of the Court.

mentary, and the four leagues of land *shall be laid off*," etc. It was held that these words gave to the reservees a fee simple to all rights which the Caddoes had in those lands, as fully as any patent from the government could make one.

Fremont v. United States, 17 How. 542, was a case of a Mexican grant of a tract of land known as "Las Mariposas," within certain undefined boundaries. The grant was of ten square leagues, subject to certain conditions, and was to be made definite by a future survey. The grant purported to convey a present and immediate interest, in consideration of previous public services, and it was decided to be *in presenti* upon the authority of *Rutherford v. Greene*, 2 Wheat. 196 — that the conditions were conditions subsequent, but that non-compliance with them did not amount to a forfeiture of the grant. Two members of the court dissented, being of opinion that the case was controlled by those of *United States v. Boisdere*, 11 How. 63, 96; *Glenn v. United States*, 13 How. 250, 259, and *Vilemont v. United States*, 13 How. 261.

In the cases arising under the railroad land grants, of which *Schulenberg v. Harriman*, 21 Wall. 44, is a leading one, the language of the granting clause was in the present tense, "*there be, and hereby is, granted*," etc.; and it has always been held that these were grants *in presenti*, although the lands could not be identified until the map of the definite location of the road was filed, when the title, which was previously imperfect, acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here. *Lessieur v. Price*, 12 How. 59; *Leavenworth, Lawrence & Co. Railroad v. United States*, 92 U. S. 733; *Missouri, Kansas & Texas Railway Co. v. Kansas Pacific Railway*, 97 U. S. 491; *Railway Company v. Alling*, 99 U. S. 463, 475; *St. Paul & Pacific Railroad v. Northern Pacific Railroad*, 139 U. S. 1; *Deseret Salt Company v. Tarpey*, 142 U. S. 241.

The same doctrine has also been applied to grants of swamp and overflowed lands by the acts of September 28, 1850, and June 10, 1852. *Railroad Company v. Smith*, 9 Wall. 95; *Wright v. Roseberry*, 121 U. S. 488.

Opinion of the Court.

One or two cases, which apparently hold a contrary doctrine, are readily reconcilable. That of *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U. S. 634, arose under the school land grant contained in the act of March 21, 1864, c. 36, enabling the people of Nevada to form a state government. 13 Stat. 30. The seventh section of the act provided "that sections numbered 16 and 36 in every township . . . shall be, and are hereby, granted, to said State." These words were held, under the peculiar language of the act, not to constitute a grant *in presenti*, but an inchoate and incomplete grant until the premises were surveyed by the United States, and the survey properly approved. "We do not seek," said the court, "to depart from this sound rule;" (in *Schulenberg v. Harriman*,) "but, in this instance, words of qualification restrict the operation of those of present grant." "A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. . . . Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them."

In *Hall v. Russell*, 101 U. S. 503, the language of the grant was "that *there shall be, and hereby is*, granted to every white settler or occupant of the public lands," and it was held that, as the land was not identified and the grantee was not named, there could not be a present grant. "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time."

In the case of *Rice v. Railroad Co.*, 1 Black, 358, the granting clause of the act was in the present tense, but there was a further clause expressly declaring that no title should vest nor

Opinion of the Court.

any patent issue till certain portions of the road had been completed.

From this summary of cases it is evident that the language of the granting clause is not conclusive, but the intent of Congress must be gathered from the whole scope of the instrument, and the facts to which it was intended to apply. Applying the principle of the cases above cited to the one under consideration, we are of the opinion that the grant in question was intended to invest a present legal title in the Indians, for the following reasons:

First. There is no doubt that the cession by the Indians of their interest in the Wisconsin lands, in the first article of the treaty, was an absolute, unconditional and immediate grant, and it is improbable that the Indians would have consented, or that the United States would desire, that they should accept from the Government a mere promise to set apart for them in the future the tract in Kansas. If we are to adopt such a construction it would follow that the title of the Indians, not only to the tract in Kansas, but to the lands in Wisconsin, was made dependent upon their removal to their new home. While it might be reasonably contended that their failure to remove should result in a cancellation of the treaty and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain. The object of the treaty was evidently to effect an exchange of lands in pursuance of the act of May 28, 1830, c. 148, 4 Stat. 411, the third section of which provides "that in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guaranty to them and their heirs or successors the country so exchanged with them; and, *if they prefer it*, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

Opinion of the Court.

Second. The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. There was no uncertainty as to the lands granted, or as to the identity of the grantees, which, in the case of *Heydenfeldt v. Daney Mining Co.*, 93 U. S. 634, was held to turn it into a grant *in futuro*.

Third. While the granting clause is in the future tense, an agreement to set apart, the *habendum* clause is in the present tense: "To have and to hold the same in fee simple to the said tribes, or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations or bands, in severalty, with the right to sell and convey to and from each other." The object of the *habendum* clause is said to be "to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted, or demised, and to what use." Sheppard's Touchstone, 74. It may explain, enlarge or qualify, but cannot contradict, or defeat, the estate granted by the premises, and where the grant is uncertain, or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying or controlling it. Jones on Real Prop. § 563; Devlin on Deeds, § 215.

In this case if the *habendum* clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and *habendum* clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the *habendum* clause removes that doubt, and imports a present surrender of a defined tract. The addition of the words, "by a patent from the President of the United States," is immaterial, since it refers

Opinion of the Court.

to, and is intended to be construed in connection with the third section of the act of May 28, 1830, in which the issue of a patent is merely spoken of as an optional or preferential method of acquiring full title to the land.

Fourth. By Article X a special provision was made for the Senecas by which the easterly part of the tract was set apart for them, and a deed made by them of their New York lands to Ogden and Fellows was recognized and approved of by the Government, and the consideration invested for their use. And by Article XIV another special tract of the lands granted was set off for the Tuscaroras, who conveyed to the United States 5000 acres of land in New York to be held in trust for them, and another deed to Ogden and Fellows of lands in New York was assented to and sanctioned by the Government.

These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas.

3. There is, however, another consideration which must not be overlooked in this connection, and which raises the only difficult point in the interpretation of the treaty. It is found by the court below (finding 10) that, when the treaty was laid before the Senate for ratification, June 11, 1838, the third, fourth, fifth, sixth, ninth and nineteenth of the original articles were stricken out, several others were amended by eliminating particular clauses, a new article was added as Article XV, and the ratification made subject to the following condition:

" Provided always, and be it further resolved, (two-thirds of the Senate present concurring,) That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given

Opinion of the Court.

their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only."

Now, if the above proviso (that if any portion or part of said Indians do not emigrate, the President shall . . . deduct from the quantity of land allowed west of the Mississippi such numbers of acres as will leave to each emigrant 320 acres only) be considered a part of the treaty and to be respected as such, it would be difficult to avoid the conclusion that the grant of Kansas lands was not intended to take immediate effect, since the power to *deduct* (differing in that respect from the power to *forfeit* contained in the third article) would show an intention that the grant as a whole should not take immediate effect, and would imply that it was extended only to 320 acres to each emigrant. If the allotment is to be treated as one of 320 acres for each emigrant and not of the entire tract as specified in article two, the residue, of course, belongs to the Government.

But did this resolution ever become operative? It is not found in the original nor in the published copy of the treaty, nor in the proclamation of the President, which recites that the Senate did, by a resolution of the 11th of June, 1838, "advise and consent to the ratification of said treaty with certain amendments; *which treaty, as so amended, is word for word as follows*, to wit:" (Here follows a copy of the treaty as published in 7 Stat. 550.) But no allusion is here made to the final resolution or its proviso. This is the more remarkable, as every other amendment made by the Senate appears in the treaty as published, while no reference what-

Opinion of the Court.

ever is made to this—the reason probably being that the resolution was mainly directory in its character, requiring that the treaty be fully and fairly explained by the commissioner to each of the tribes separately assembled in council, and that they should give their free and voluntary assent thereto. The proviso may also have been well considered as merely directory to the President, but in any event it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the grant.

The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did, on March 25, 1840, resolve that the treaty, “together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes,” but, as the proclamation purported to set forth the treaty “word for word” as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation.

The case of *Doe v. Braden*, 16 How. 635, relied upon by the Government in this connection, is not in point. In this case, in the ratification by the King of Spain of the treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida were annulled

Opinion of the Court.

and declared to be void, and it was held that a written declaration, annexed to a treaty at the time of its ratification, was as obligatory as if the provision had been inserted in the body of the treaty itself. The question in the case was whether the king had power to annul the grant, which was considered a political and not a judicial question; but, as the annulling clause was inserted in the ratification and published in both countries as part of the treaty, there was no question whatever of concealment.

4. Assuming that the Indians took an immediate title to the lands reserved for them in Kansas, we are next to inquire whether such title has been legally forfeited. By the third article of the treaty it was further agreed "that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States."

Acting in pursuance of the treaty and of the assumed right of forfeiture, the Government surveyed, and made part of the public domain, the lands at Green Bay ceded by the claimants and sold or otherwise disposed of, and conveyed the same and received the consideration therefor, except a reservation of about 65,000 acres to the Oneidas. The lands west of the Mississippi (the Kansas lands) were, after the treaty of Buffalo Creek, surveyed and made a part of the public domain, and sold or otherwise disposed of by the United States, which received the consideration therefor, and these lands were thereafter and now are included within the territorial limits of the State of Kansas.

In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by simple executive action to reënter, take possession of the lands and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may reënter in the case of the breach of a condition subsequent, and the Government, which can

Opinion of the Court.

only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States v. Repentigny*, 5 Wall. 211, 267, in which the court said: "We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government, without these preliminary proceedings." Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg v. Harri-man*, 21 Wall. 44, 63; in *Farnsworth v. Minnesota & Pacific Railroad*, 92 U. S. 49; and in *Van Wyck v. Knevals*, 106 U. S. 360. In *St. Louis, Iron Mountain &c. Railway Co. v. Magee*, 115 U. S. 469, it was said that "legislation to be sufficient" (for that purpose) "must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." See, also, *Pacific Railway Co. v. United States*, 124 U. S. 124. As there is no pretence that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the Government.

5. But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evi-

Opinion of the Court.

dence offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture. Jones on Real Prop. §§ 678, 679.

It will be observed that the forfeiture is conditioned, not upon the actual removal of the Indians to the Kansas reservation, but upon their accepting and agreeing to removal within five years, or such other time as the President might from time to time appoint. The tribes for whom the Kansas lands were intended as a future home were the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns, residing in the State of New York.

Of these the Senecas and certain of the Cayugas and Onondagas residing among them expressly agreed in Article X "to remove from the State of New York to their new homes within five years, and to continue to reside there."

By Article XIII the Oneidas also agreed to remove as soon as they could make satisfactory arrangements for the purchase of their lands at Oneida.

By Article XIV the Tuscaroras also agreed to accept the country set apart for them, and to remove there within five years, and to continue to reside there.

In a supplemental treaty made with the St. Regis Indians on February 13, 1838, it was agreed that any of them who wished to do so should be at liberty to remove to Kansas at any time thereafter within the time specified in the treaty, but the Government should not compel them to remove.

It thus appears that, as to three of these tribes, there has been a technical performance so far as a forcible removal was concerned.

It further appears from the eleventh, twelfth and thirteenth findings that the President never fixed any time for their removal, as was contemplated in the third article; that many of the Indians protested against any removal; that the Onondagas officially declared they would not remove; that —

"After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with

Opinion of the Court.

them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do."

It further appeared that —

"No provision was made for the actual removal of more than about 260 individuals of the claimant tribes. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

"In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

"The sum of \$9464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

"From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

"It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas."

It is further found that —

"A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian

Opinion of the Court.

Commissioner, to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained."

In these findings lie the main strength of the defence.

It thus appears that a part had accepted and agreed to remove ; that a few had actually removed ; that others had stipulated that they should not be compelled to remove, and still others protested against the treaty and refused to remove. If the acceptance and signing of the treaty is not to be considered in itself as an acceptance and agreement to remove, as to which we express no opinion, there was a technical compliance with the conditions of Article III by a part of the Indians, and a flat refusal upon the part of others. But, after all, a mere agreement to accept and remove, though probably sufficient to prevent a legal forfeiture, was of no practical value, and would have availed the Government nothing, except as it might have justified a forcible removal had the Government elected to take that course. No provision was made as to the manner in which the removal was to be effected, but from the dependent character of the Indians, and from the appropriation of \$400,000, made for that purpose, it is evident that it was contemplated that the removal should be made by the Government itself. It was so held by this court in *Fellows v. Blacksmith*, 19 How. 366, and we see no reason to question the propriety of that ruling. Whether the Government could have removed them forcibly was not decided in that case, and is not in this.

The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them. This is the main defence in the case. Upon the other hand, no time was fixed by the President for their removal ; no formal notice was ever given them to remove ; but at various times, and particularly at the council held at Cattaraugus, June 2, 1846, called by the com-

Opinion of the Court.

missioners to learn the final wishes of the Indians as to emigration, the chiefs of the four tribes present were unanimous in the opinion that scarcely any Indians, who wished to emigrate, remained. This action constitutes practically the only claim of forfeiture. There is no finding that the other five tribes did refuse. The practical application which counsel seek to make of this partial refusal is to justify the Government, not only in appropriating the Kansas lands, but, inferentially, in failing to make any other compensation to the Indians for the seizure and sale of the Wisconsin lands. In view of this, it seems to us that, to justify a forfeiture, it should appear that the repudiation was as formal, as broad and as unequivocal as the acceptance; that the President should have fixed a time for the removal, and should at least have made a formal tender of performance. If it be said that, considering the number of the tribes and the character of the individuals he was dealing with, this was impracticable, it may also be said that the Government had undertaken to negotiate a treaty with them severally and collectively, and if it sought to enforce a forfeiture of rights originating in such treaty, it should have given formal notice to that effect, that the Indians might understand that they were risking the loss of all compensation for their Wisconsin lands by refusing to emigrate.

But however this may be, we think the fact that the Government never insisted upon this as an estoppel, and never treated the Indians as having lost their rights in the Kansas lands, is a sufficient answer to the claim of abandonment. After their refusal at the council in 1846, nothing appears to have been done until 1854, when Kansas had begun to feel the impress of a sudden and large immigration from the East, and an act (act of May 30, 1854, c. 59) known as the Kansas-Nebraska act was passed, creating the Territory of Kansas, in which Congress defined the limits of the new Territory, 10 Stat. 277, 284, and, after giving the boundary lines, which included the New York Indian lands —

“*Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now

Opinion of the Court.

pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory, *which by treaty with any Indian tribe*, is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribes shall signify their assent to the President of the United States to be included within the said Territory of Kansas."

The thirty-seventh section of the same act (p. 290) provides —

"That all treaties, laws and other engagements made by the Government of the United States with the Indian tribes inhabiting the Territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

Even if the first clause of this proviso be limited to the Indians, then "in said Territory," of whom only thirty-two were New York Indians, the second clause is subject to no such limitation, and applies to treaties "with any Indian tribe." The reference here is evidently to the treaty of Buffalo Creek, and is a distinct recognition of the subsisting validity of such treaty, and a promise on the part of Congress that it shall be faithfully and rigidly observed, "notwithstanding anything contained in this act," and we may add, notwithstanding the refusal of the Indians to emigrate and the now claimed forfeiture of their rights.

Some steps were taken to effect a settlement with the Indians, and on November 5, 1857, a treaty was entered into with the Tonawandas in which, after reciting the treaty of 1838, the surrender of 500,000 acres of lands in Wisconsin, the agreement to set apart the lands in Kansas, the Tonawandas relinquished their interest in the Kansas lands, the United States agreeing to pay them therefor the sum of \$256,000. 11 Stat. 735. But the Tonawandas were but one of the nine tribes which participated in the treaty, and there seems to have been no reason why their claim should have

Opinion of the Court.

been recognized in preference to others who stood upon the same footing. Upon the theory of the Government, there was no reason why this treaty should have been entered into at all. It was clearly a recognition of the fact that the Tonawandas had rights which, in the nineteen years which had elapsed since the treaty was made, they had not forfeited.

But this is not all: In the eleventh section of the sundry civil appropriation act of March 3, 1859, c. 82, 11 Stat. 425, a provision was made for the issue of patents to Indians who were entitled to separate selection of lands in Kansas, with a proviso that "nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made with them in 1838 at Buffalo Creek." If this was not a recognition of the fact that the Indians still had rights, it certainly shows that their alleged rights had been made the subject of consideration, and were not repudiated or denied.

But it seems that the matter did not rest here, for in the same month in which the last above act was passed, namely, March 21, 1859, the Secretary of the Interior directed the New York Indian reservation in Kansas to be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under the treaty, after which the residue was to become public domain, and in December, 1860, the President proclaimed the reservation to be a part of the public domain.

Notwithstanding this, however, in the act of January 29, 1861, c. 20, 12 Stat. 126, admitting Kansas to the Union as a State, it was provided that nothing should be so construed as to impair the rights of person or property pertaining to the Indians in said Territory so long as such rights should remain unextinguished by treaty. It may be said that the provisos in this act applied only to the Indians in said Territory, but even if it be so limited, the provision in the act of March 3, 1859, clearly applies only to the New York Indians, whose rights under the treaty were recognized. Up to the time these acts were passed certainly there had been no denial of the right of the Indians to these lands, and no action on the

Opinion of the Court.

part of the Government indicating an intent to insist upon the forfeiture of such right. Every legislative expression tended toward an acknowledgment of the fact that their claim was unimpaired.

Our attention has also been called to certain documents emanating from the executive and legislative departments of the Government, some of which tend to strengthen the idea that these departments never intended to treat the action of the Indians as a forfeiture of their grant, and acquiesced in the justice of the claims the Indians now make, and have already made under the treaty of Buffalo Creek. It is insisted by the Attorney General that, as these documents are not referred to in the findings of fact by the court below, this court cannot consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. *Jones v. United States*, 137 U. S. 202, 214.

While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

As indicating the views of the executive in regard to the justice of the Indians' claims, a treaty was concluded September 2, 1863, with the New York Indians who had moved to Kansas under the treaty of 1838, for the purpose of extinguishing their title to lands in that State. This treaty was based on the treaty of November 5, 1857, with the Tonawandas, and was sent to the Senate for ratification, but action was suspended upon it "until a treaty could be concluded with all the New York Indians to arrange all matters between them and the United States which required adjustment." Ex. Doc. Y, p. 2, 40th Cong. 3d sess.

In pursuance of this policy, the President, in May, 1864, directed a commissioner to proceed to the State of New York for the purpose of negotiating a treaty with the New York

Opinion of the Court.

Indians. These Indians had been previously notified on April 26, 1864, by the Secretary of the Interior that he deemed it proper to advise them, through their agent, "that it is the desire of the Government to extinguish their title to a tract of land in Kansas, ceded to them by the treaty of January 15, 1838;" and that a treaty had already been made for that purpose with the fragments of bands of these Indians residing in Kansas. Ex. Doc. No. 1, 38th Cong. 2d sess. p. 188.

The treaty with the Indians living in New York was not concluded, but in his annual report to Congress the Secretary of the Interior on December 6, 1864, spoke of the efforts to extinguish the title of these Indians to the Kansas lands, and considered their claims as "being undeniable and just." *Ibid.*

This opinion was reiterated by the Commissioner of Indian Affairs on December 5, 1866, in his annual report. (p. 61.)

In November, 1868, the President again attempted to negotiate a treaty or treaties with the Senecas and other New York Indians with reference to "their claims arising under the treaties of 1838 and 1842." Ex. Doc. Y, p. 10, 40th Cong. 3d sess. And thereafter a treaty was concluded December 4, 1868, according to the instructions issued to the commissioner appointed to negotiate it, by which the United States agreed to pay the sum of \$320 to each Indian, including half-breeds, of the Six Nations in New York and Wisconsin. *Ibid.* p. 1.

The commissioner appointed to negotiate this treaty reported to the Indians in council that "the reason why the New York Indians had not been removed to their Kansas reservation was because squatters had obtained possession of their lands, and the United States was unable to drive them off, and keep them off." *Ibid.* p. 10.

This treaty, however, was not ratified by Congress owing presumably to the passage of a general law which denied the right of any Indian tribe or nation to be recognized as an independent nation for treaty-making purposes. Act of March 3, 1871, c. 120, 16 Stat. 544, 566.

In a communication dated January 29, 1884, addressed to

Opinion of the Court.

the Secretary of the Interior for transmission to the Senate, the Commissioner of Indian Affairs reviewed the claims of the New York Indians under the treaty of 1838, and adhered to the opinions of his predecessors, in that there was a failure on the part of the Government to provide homes for those who went to Kansas, and that no consideration had been given the New York Indians for the cession of the 500,000 acres of Wisconsin lands. He referred to the settlement with the Tonawandas, and stated that he saw "no reason why the other tribes should not receive the same relief."

While none of these documents are of great importance in themselves, they serve to indicate very clearly that in the mind of the Executive and departmental officers the rights of the Indians, under the treaty of Buffalo Creek, were continuously recognized as just claims against the Government.

We are at a loss to understand upon what theory this can be considered an abandoned claim. If the evidence pointed in that direction the argument would come with better grace if the Government had not itself received the full consideration stipulated by the treaty (so far as such consideration was a valuable one) for the Kansas lands, and had neglected to render any account of the same. Of course, if the legal title passed to these Indians, something else than a failure to assert such title is necessary to divest it. But however this may be, the court finds (finding 17) that after the order of the Secretary of the Interior of 1859, and before the proclamation of the President of said lands as part of the public domain in December, 1860, "some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims." How long, or how frequently, or in what manner the Indians continued to assert their claims, does not appear; but it seems that on June 21, 1884, their claims, together with the vouchers, papers, proofs and documents appertaining thereto, were referred to the

Opinion of the Court.

Court of Claims for an investigation and finding of facts. To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case. Indeed, it is not altogether clear that the Government did not waive this point in the act of 1893, conferring jurisdiction upon the Court of Claims to enter judgment, when it declared that the statute of limitations should not be pleaded as a bar to recovery.

The appropriation of these lands by the Government is probably explicable by the fact that an enormous emigration to Kansas was at that time in progress for the avowed purpose of preventing the establishment of slavery in the Territory; that the pressure of population for land was very great; that the Territory was almost in the throes of civil war; that the negotiation of a new treaty with nine different tribes would be attended with considerable delay; that but few of the Indians had actually removed and resided in Kansas, and that the Secretary of the Interior assumed, what undoubtedly the facts had some tendency to show, that the grant had lapsed by the failure of the Indians to emigrate, and therefore considered himself fully justified in taking possession of the lands, and settling with the Indians in a future treaty. The claim of the Tonawandas was actually settled. Congress, in the act of 1861 admitting Kansas, provided for the subsequent extinguishment of Indian titles; but a great civil war then intervened, and for several years absorbed the attention of Congress, and the matter does not seem to have been resuscitated until after the lapse of about twenty years, when Congress referred the case to the Court of Claims, with an express waiver of the statute of limitations. We do not perceive in all this an intention on the part of the Indians to abandon their claims, or any indication on the part of Congress that it considered it abandoned.

6. But little need be said considering the cash payments to be made under the ninth, twelfth, thirteenth and fourteenth articles of this treaty. Most, if not all, of these payments were to be made upon the actual removal of these Indians to the West, and as this contingency never happened, the

Syllabus.

amounts never became due. The same ruling applies to the appropriation of \$400,000 in the fifteenth article, which was made to aid in removing the Indians to their new homes, supporting them the first year after their removal, and for other incidental purposes contingent upon their removal.

The judgment of the Court of Claims is therefore reversed, and the case remanded with instructions to enter a new judgment for the net amount actually received by the Government for the Kansas lands, without interest, less the amount of lands upon the basis of which settlement was made with the Tonawandas, and other just deductions, and for such other proceedings as may be necessary, and in conformity with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissented.

NEW YORK INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Announced May 23, 1893.

The judgment and mandate in this case, 170 U. S. 1, are amended.

In this case it is ordered that the judgment and mandate be amended so as to read as follows:

"The judgment of the Court of Claims is therefore reversed and the cause remanded with instructions to enter a new judgment for the net amount actually received by the Government for the Kansas lands, without interest, less any increase in value attributable to the fact that certain of these lands were donated for public purposes, as well as the net amount which the court below may find could have been obtained for the lands otherwise disposed of if they had all been sold as public lands, less the amount of lands upon the basis of which settle-

HO

OLLOWAY v. DUNHAM.

615

Statement of the Case.

ment was made w
acres allotted to thith the Tonawandas, and less the 10,240
forth in finding twthe thirty-two New York Indians, as set
as may seem to the elve, together with such other deductions
proceedings as may court below to be just, and for such other
opinion." be necessary and in conformity with this